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1972 Foreign Direct Investment Program

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U.S. DEPARTMENT OF COMMERCE
Office of Foreign Direct Investments

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TITLE 15—COMMERCE AND FOREIGN TRADE

Chapter X—Office of Foreign Direct Investments, Department of Commerce

PART 1000—FOREIGN DIRECT INVESTMENT REGULATIONS

Subpart A—Relation of This Part to Other Laws and Regulations

§ 1000.101 Relation of this part to other laws and regulations.

(a) This part is independent of Title 31 CFR, Chapter V. The prohibitions contained in this part are in addition to the prohibitions contained in said Chapter V. No license contained in or issued pursuant to said Chapter V shall be deemed to authorize any transaction prohibited by this part, nor shall any license or authorization issued pursuant to any other provision of law be deemed to authorize any transaction so prohibited.

(b) No authorization or exemption contained in or issued pursuant to this part shall be deemed to authorize any transaction to the extent that it is prohibited by reason of the provisions of any law or statute other than 12 U.S.C. 95a, as amended, or any proclamation, order, or regulation other than those contained in or issued pursuant to Executive Order 11387 or this part.

(c) No authorization or exemption contained in or issued pursuant to this part shall be deemed to authorize any transaction to the extent that it is prohibited by reason of the provisions of any part of Titl 31 CFR

Subpart B—Prohibitions

§ 1000.201 Prohibited direct investment in affiliated foreign nationals.

(a) Except as provided in this part, and as otherwise permitted by the Secretary of Commerce (hereinafter referred to as the Secretary) by means of rulings, instructions, authorizations, waivers, exemptions or otherwise, positive direct investment by a direct investor in affiliated foreign nationals of such direct investor in Schedule A, B, or C countries is prohibited during any year (as defined in § 1000.321) commencing with the effective date.

(b) (1) All transactions prohibited by section 1 of Executive Order 11387 which are not prohibited by this part are hereby authorized.

(2) To the extent delineated from time to time by the Board of Governors of the Federal Reserve System nothing in this part shall apply to any bank or other financial institution certified by the Board as being subject to the Federal Reserve Foreign Credit Restraint Program, or to any program instituted by the Board under section 2 of Executive Order 11387.

(c) Nothing contained in this part shall be construed to limit the right of a person within the United States to make a bona fide transfer of capital or earnings in the ordinary course of business to a foreign national in respect of an interest in such person held by such foreign national.

(d) In addition to all other powers reserved to the Secretary in this part, the Secretary may in his discretion, as to any direct investor, amend or revoke the authorizations set forth in this part by reducing the amount of positive direct investment, positive net transfers of capital and reinvestment of earnings authorized in any scheduled area during a year, by limiting the application of such authorizations and exemptions and of § 1000.201 from "during any year" to periods shorter than a year, and by otherwise imposing such conditions as the Secretary shall deem appropriate to carry out the purposes of this part. In exercising his discretion with respect to any direct investor, the Secretary may consider, among other factors, the following:

(1) Whether the positive direct investment, positive net transfers of capital or reinvestment of earnings by such direct investor in any scheduled area during any quarter is, or may reasonably be estimated to be, materially in excess of 25 percent of the amount thereof generally authorized to such direct investor during the year;

(2) Whether the transactions resulting in such excess during such quarter are in accordance with the customary business practices of the direct investor; and

(3) Whether the direct investor has complied with the provisions of Subpart F of this part.

§1000.202 Repatriation of direct investment earnings. (REVOKED)

§ 1000.203 Liquid foreign balances.

(a) For purposes of this section:

(1) The term "foreign balances" means money on deposit in a foreign bank (as defined in § 1000.317), including certificates of deposit and fixed interest deposits of such a bank, negotiable instruments, nonnegotiable instruments acquired after June 30, 1968 and commercial paper of an unaffiliated foreign national (other than negotiable instruments, nonnegotiable instruments or commercial paper arising from the export by the direct investor of goods or services from the United States to foreign nationals) and securities issued or guaranteed by a foreign country.

(2) The term "liquid foreign balances" means foreign balances (as defined in subparagraph (1) of this paragraph) other than (i) those negotiable instruments, nonnegotiable instruments, commercial paper and securities which are acquired on or before June 30, 1968, and which are not redeemable at the option of the direct investor and are not transferable and readily marketable; (ii) bank deposits, negotiable instruments, nonnegotiable instruments, commercial paper and securities with a period of more than 1 year remaining to maturity when acquired by the direct investor and which are not redeemable in full at the option of the direct investor within a period of 1 year after such acquisition; (iii) foreign balances which are subject to restrictions of a foreign country on liquidation and transfer; and (iv) foreign balances which have been pledged or hypothecated in connection with borrowings by a direct investor or its affiliated foreign nationals.

(3) [Revoked]

(4) Foreign balances shall be deemed to be held by a direct investor if title to such balances is held (i) by any person (including an affiliated foreign national of the direct investor) principally formed or availed of for the purpose of holding title to such balances; or (ii) by any person (including an affiliated foreign national of the direct investor), if such balances are returnable to the direct investor on its demand without material conditions and if the holding of such balances is unrelated to the business needs of such person.

(5) Negotiable instruments, non-negotiable instruments, commercial paper and securities constituting foreign balances shall be valued at their respective fair market values or, if evidence of fair market value is not readily available, at the cost to the direct investor.

(b) Each direct investor shall maintain books and records that identify separately all proceeds of long-term foreign borrowing received with respect to each long-term foreign borrowing made by the direct investor and the uses to which such proceeds have been put.

(c) Each direct investor is hereby required to limit the amount of liquid foreign balances held at the end of any month (other than Canadian foreign balances, as defined in § 1000.1105(a)) to the sum of (1) the amount of available proceeds (as defined in § 1000.324(d)) of such direct investor at the end of such month, plus (2) the greater of (i) the average end-of-month amount of such balances (other than available proceeds in the form of such balances, and Canadian foreign balances) held by such direct investor during 1965 and 1966 (whether or not a direct investor at that time) or (ii) $100,000.

(d) (1) [Revoked]

(2) A direct investor which, during 1968 or any succeeding year, expended proceeds of long-term foreign borrowing and made a deduction from net transfer of capital to a scheduled area under § 1000.313(d)(1) may thereafter deduct, during 1969 or any succeeding year, from positive direct investment in a different scheduled area, an amount equal to all or a part of such expended proceeds as are allocated pursuant to this subparagraph. Proceeds shall be allocated in a different scheduled area pursuant to this subparagraph if (i) an entry is made in the books and records maintained by the direct investor under paragraph (b) of this section and § 1000.601; (ii) the allocation and the deduction from positive direct investment in a different scheduled area are reported on the next annual report of the direct investor (Form FDI-102F) filed for the year for which the deduction is made; and (iii) the proceeds with respect to which such deduction is

made, as of the end of the year for which the deduction is made and thereafter, are not held, directly or indirectly, in the form of foreign balances or in the form of securities (including debt obligations, equity interests and any other type of investment contract) of foreign nationals or in the form of any other foreign property: *Provided,* That such proceeds may remain expended in an affiliated foreign national or again be expended at any time in making transfers of capital to affiliated foreign nationals. The direct investor shall be deemed at the time of such deduction from positive direct investment in a different scheduled area to have made a transfer of capital equal to the amount of such deduction to the scheduled area in which the deduction from net transfer of capital under § 1000.313(d)(1) was previously made. The direct investor may thereafter continue to change the scheduled area in which a deduction from positive direct investment is made, up to the amount of proceeds of long-term foreign borrowing expended in making the original transfer of capital for which a deduction under § 1000.313(d)(1) was made: *Provided,* That each time such change occurs, the direct investor shall be deemed to have made a transfer of capital to the immediately previous scheduled area in the amount of the deduction from positive direct investment in the subsequent scheduled area.

(3) A direct investor which, during 1968 or any succeeding year, allocates proceeds of long-term foreign borrowing and deducts the amount of such proceeds from positive direct investment in a scheduled area under § 1000.306(e), may, during 1969 or any succeeding year, reallocate all or part of such proceeds of long-term foreign borrowing to positive direct investment in another scheduled area. The direct investor which makes a reallocation under this subparagraph (3) shall be deemed at the time of such reallocation to have made a transfer of capital equal to the amount so reallocated to the scheduled area in which the proceeds of long-term foreign borrowing were allocated immediately prior thereto. The direct investor may thereafter continue to reallocate to different scheduled areas, up to the amount of proceeds of long-term foreign borrowing previously allocated: *Provided,* That each time such reallocation occurs, the direct investor shall be deemed to have made a transfer of capital equal to the amount so reallocated to the scheduled area to which the proceeds of long-term foreign borrowing were allocated or reallocated or immediately prior to such reallocation.

(e) [Revoked]

§ 1000.204 Evasion.

Anything in this part to the contrary notwithstanding, any transaction for the purpose of, or which has the effect of, evading or avoiding any of the provisions set forth in this part may be disregarded in whole or in part for purposes of measuring compliance with the provisions of this part.

Subpart C—General Definitions

§ 1000.301 Foreign country.

The term "foreign country" includes, but not by way of limitation:

(a) The state and the government of any foreign country as well as any political subdivision, agency, or instrumentality thereof or any territory, dependency, colony, protectorate, mandate, dominion, possession or place subject to the jurisdiction thereof.

(b) Any other government (including any political subdivision, agency, or instrumentality thereof) to the extent and only to the extent that such government exercises or claims to exercise control, authority, jurisdiction or sovereignty over territory which constitutes such foreign country.

(c) [Revoked]

(d) Any territory which is controlled or occupied by the military, naval or police forces or other authority of a foreign country.

§ 1000.302 Foreign national.

(a) The term "foreign national" means a foreign country (as defined in § 1000.301) and any person which is not a person within the United States (as defined in § 1000.322), including a corporation or partnership organized under the laws of a foreign country (as defined in § 1000.304(a)(1)(i)), a business venture conducted within a foreign country (as defined in § 1000.304(a)(1)(ii) and (iii)), and a foreign bank (as defined in § 1000.317(b)).

(b) Notwithstanding the provisions of paragraph (a) of this section, the Secretary retains full power to determine that any person is a foreign national.

§1000.303 Nationals of more than one foreign country. (REVOKED)

§ 1000.304 Affiliated foreign national.

(a) Except as provided in paragraphs (b)(4), (c), and (d) of this section, the term "affiliated foreign national" of a person within the United States includes each of the following in which such person owns, directly or indirectly, a 10-percent interest:

(1) A corporation or partnership organized under the laws of a foreign country (including all business ventures conducted by employees or partners of such corporation or partnership on behalf of such corporation or partnership within any foreign countries assigned to the same scheduled area as the country of organization);

(2) A business venture conducted within a foreign country on behalf of such person within the United States by such person or by employees or partners of such person; and

(3) A business venture conducted on behalf of a corporation or partnership organized under the laws of a foreign country by employees or partners of such corporation or partnership if the business venture is conducted within a foreign country which is not assigned to the same scheduled area as the country of organization.

For purposes of determining whether a business venture conducted on behalf of a foreign corporation or partnership is a separate affiliated foreign national, Canada shall be deemed to be in a scheduled area other than Schedule B.

(b)(1) A corporation or partnership referred to in paragraph (a)(1) of this section is an affiliated foreign national in the scheduled area in which the foreign country under whose laws it is organized is located. A business venture referred to in paragraph (a) (2) or (3) of this section is an affiliated foreign national in the scheduled area in which the business is conducted: *Provided,* That, if such a business venture is conducted in more than one scheduled area during any year, the scheduled area in which the business venture is conducted for the greatest period of time during such year shall, for purposes of this section, be deemed the only scheduled area in which the business venture is conducted during such year.

(2) The term "10 percent interest," when used with respect to any corporation, partnership or business venture referred to in paragraph (a) of this section, means (i) 10 percent or more of the total combined voting power of all outstanding securities of such corporation or (ii) 10 percent or more of the profit interest in such partnership or business venture. Whether a person within the United States directly or indirectly owns a 10 percent interest in a corporation, partnership or business venture referred to in paragraph (a) of this section shall be determined in accordance with the provisions of §§ 1000.901 and 1000.902.

(3) For purposes of this part, the term "incorporated affiliated foreign national" includes a corporation described in paragraph (a)(1) of this section and the term "unincorporated affiliated foreign national" includes a partnership described in paragraph (a)(1) of this section and a business venture described in paragraph (a) (2) or (3) of this section.

(4) Notwithstanding the provisions of paragraph (a) of this section and the foregoing provisions of this paragraph (b), the Secretary retains full power, with respect to any person within the United States, to determine that any person is an affiliated foreign national of such person within the United States and to determine the scheduled area in which such affiliated foreign national is located.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a corporation, partnership or business venture referred to in paragraph (a) of this section shall not be considered an affiliated foreign national of a person within the United States if the operations of such corporation, partnership or busi-

ness venture consist solely of charitable, educational, religious, scientific, literary or other similar activities not engaged in for profit.

(d) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a business venture referred to in paragraph (a) (2) or (3) of this section shall not be considered an affiliated foreign national of a person within the United States during any year if (1) the business venture does not have or involve, at any time during such year, gross assets of more than $50,000 (valued at the greatest of cost, book value, replacement value or market value); or (2) the business venture is commenced during such year and is not reasonably expected to be conducted within one or more foreign countries for more than 12 consecutive months; or (3) the business venture is terminated during such year and was not in fact conducted within one or more foreign countries for more than 12 consecutive months.

§ 1000.305 Direct investor.

The term "direct investor" means any person within the United States which directly or indirectly owns or acquires a 10-percent interest in a corporation or partnership organized under the laws of a foreign country or in a business venture conducted within a foreign country as described in § 1000.304.

§ 1000.306 Positive and negative direct investment.

(a) Direct investment by a direct investor in all affiliated foreign nationals in any scheduled area during any period means:

(1) The net transfer of capital (as defined in § 1000.313(c)) made during such period by the direct investor to all incorporated and unincorporated affiliated foreign nationals in such scheduled area; and

(2) The direct investor's share in the total reinvested earnings of all incorporated affiliated foreign nationals in such scheduled area during such period (computed in accordance with paragraphs (b) and (c) of this section).

(3) If the sum of subparagraphs (1) and (2) of this paragraph is in excess of zero, the direct investment during such period shall be positive direct investment; if a negative amount, it shall be negative direct investment.

(b) A direct investor's share in the total reinvested earnings of all incorporated affiliated foreign nationals in any scheduled area during any period means the direct investor's share in the total earnings or losses during such period of such incorporated affiliated foreign nationals (computed in accordance with paragraph (c) of this section) less an amount (which may be positive or negative) obtained by subtracting (1) the sum of (i) the direct investor's share of all dividends paid during such year to such affiliated foreign nationals by incorporated affiliated foreign nationals of the direct investor in other scheduled areas and (ii) the direct investor's share of all earnings remitted during such year to such affiliated foreign nationals by unincorporated affiliated foreign nationals of the direct investor in other scheduled areas from (2) the sum of (x) all dividends paid during such year by such affiliated foreign nationals to the direct investor and (y) the direct investor's share of all dividends paid during such year by such affiliated foreign nationals to affiliated foreign nationals of the direct investor in other scheduled areas: *Provided,* That, in calculating a direct investor's share in the total reinvested earnings of incorporated affiliated foreign nationals for any year (including the years 1965 and 1966), a direct investor may elect, in such manner as the Secretary may determine, to treat dividends paid within 60 days after the end of the year as having been paid during such year.

(c) Computations of earnings or losses of affiliated foreign nationals under this section or any other provision of this part shall (except as otherwise provided herein) be made in accordance with accounting principles generally accepted in the United States and consistently applied; to the extent such principles are reflected in reports to stockholders, the computation shall follow the principles used in preparing such reports. The earnings or loss of each incorporated affiliated foreign national in that scheduled area area shall be added to the earnings or loss of every other incorporated affiliated foreign national in that scheduled area in order to determine the total earnings or losses of such affiliated foreign nationals as a group. In computing such total earnings and losses, there shall be excluded all dividends paid during such year to such affiliated foreign nationals by incorporated foreign nationals of the direct investor in the same or other scheduled areas and all earnings of unincorporated affiliated foreign nationals of the direct investor in other scheduled areas. Earnings and losses shall be computed without regard to U.S. taxes and foreign withholding taxes on the payment of dividends. Earnings shall not be reduced by application or provision by the direct investor of reserves for devaluation or impairment of investment. Notwithstanding the foregoing, the Secretary shall have the right, generally or specifically, in his discretion to disapprove any such accounting principles determined by him to be inconsistent with the purposes of this part and to prescribe such principles as he may deem appropriate to carry out the purposes of this part.

(d) For purposes of this part:

(1) Earnings of an unincorporated affiliated foreign national during any period shall be deemed to have been remitted to the extent that such earnings exceed the net increase in the net assets of the unincorporated affiliated foreign national during the period.

(2) The term "dividends" means cash dividends, whether paid out of current or accumulated earnings (other than liquidating dividends). The amount of a dividend paid shall be calculated before deducting foreign withholding taxes. A dividend shall be deemed to have been paid to a direct investor or an affiliated foreign national, as the case may be, when entered on the books of account of the recipient as actually having been paid in cash or as being subject to payment upon demand, whichever first occurs.

(e)(1) There shall be deducted from positive direct investment in a scheduled area during any year, as calculated under paragraph (a) of this section, an amount equal to any available proceeds (as defined in § 1000.324(d)) allocated by the direct investor to such positive direct investment for such year. Available proceeds shall be allocated to such positive direct investment for such year if (i) an entry is made in the books and records maintained by the direct investor under §§ 1000.203(b) and 1000.601; (ii) the allocation and deduction is reported on the next annual report of the direct investor (Form FDI–102F) filed for the year for which the deduction is made; and (iii) the proceeds, as of the end of the year for which the deduction is made and thereafter, are not held, directly or indirectly, in the form of foreign balances or in the form of securities (including debt obligations, equity interests and any other type of investment contract) of foreign nationals or in the form of any other foreign property: *Provided,* That proceeds so allocated may at any time be expended in making transfers of capital to affiliated foreign nationals. In addition, available proceeds of long-term foreign borrowing made on or before February 28, 1973 (including available proceeds so treated under § 1000.1403 (a)(1) as the result of proceeds borrowing made on or before February 28, 1973) shall be allocated to such positive direct investment for the year 1972 if bookkeeping entries and a report on Form FDI–102F for 1972 are made with respect to such allocation, as required under this section, and such proceeds, as of February 28, 1973, are not held, directly or indirectly, in the form of foreign balances or in the form of securities of foreign nationals or in the form of any other foreign property: *Provided,* That proceeds so allocated may at any time be expended in making transfers of capital to affiliated foreign nationals.

(2) [Revoked]

(3) A deduction made pursuant to subparagraph (1) of this paragraph from positive direct investment in all scheduled areas by a direct investor electing to be governed by § 1000.503 for any year, commencing with the year 1969, shall be deemed to have been made in each scheduled area in the same proportions as the amount of positive direct investment (calculated as provided in paragraph (a) of this section and, in the case of positive direct investment in the year 1969, disregarding each scheduled area's proportionate share of aggregate annual losses, as defined in § 1000.503(b) in effect for the year 1969) in such scheduled area during such year. A deduction made pursuant to subparagraph (1) of this paragraph or § 1000.203(d) (2) or (3) from

positive direct investment in Schedules B and C by a direct investor electing to be governed by § 1000.507 for any year, commencing with the year 1970, shall be deemed to have been made in each such scheduled area in the same proportions as the amount of positive direct investment (calculated as provided in paragraph (a) of this section) made by the direct investor in such scheduled area during such year. The Secretary may, upon application pursuant to § 1000.801, permit a direct investor to apportion such deductions in some other manner reasonably reflecting the direct investor's interests in each scheduled area during such year.

§ 1000.307 Person; corporation.

(a) The term "person" means an individual, corporation, partnership, business venture, trust, or estate.

(b) The term "corporation" means an organization or entity incorporated under the laws of the United States or a foreign country and any other organization or entity not so incorporated but which is organized under the laws of the United States or a foreign country and has all or a substantial part of the legal characteristics commonly attributed to corporations under the laws of the United States.

§ 1000.308 Transfer.

The term "transfer" means any act or transaction, whether or not evidenced by writing and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property wherever located.

§ 1000.309 Property, property interest.

The terms "property" and "property interest" include any property, real, personal, or mixed, tangible or intangible (including the value of services performed), or interest or interests therein, present, future or contingent.

§ 1000.310 Interest.

The term "interest" when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect.

§1000.311 Banking institution. (REVOKED)

§ 1000.312 Transfers of capital.

(a) *Transfers of capital by direct investor.* Except as otherwise provided in paragraph (c) of this section, a transfer of capital by a direct investor to an affiliated foreign national means any transfer of funds or other property by or on behalf or for the benefit of a direct investor directly or indirectly to or on behalf or for the benefit of an affiliated foreign national (including a transfer described in § 1000.505); and any transaction or occurrence as a result of or in connection with which the direct investor directly or indirectly acquires or increases a debt or equity interest in the affiliated foreign national or the affiliated foreign national directly or indirectly disposes of or reduces a debt or equity interest in the direct investor held by the affiliated foreign national. Such transfers of capital shall include, but not by way of limitation:

(1) The acquisition by the direct investor of an equity interest in or debt obligation of an affiliated foreign national (including the acquisition of an equity interest in or a debt obligation of a foreign national as a result of which the foreign national becomes an affiliated foreign national of the direct investor).

(2) A contribution by the direct investor to the capital of the affiliated foreign national.

(3) The complete or partial satisfaction by the direct investor of a debt obligation of the direct investor held by the affiliated foreign national.

(4) The reduction of an equity interest in the direct investor held by the affiliated foreign national (as the result of a redemption of stock, liquidating dividend, or like transaction).

(5) A transfer by the affiliated foreign national of an equity interest in or debt obligation of the direct investor held by the affiliated foreign national.

(6) The complete or partial satisfaction by the direct investor of a debt obligation of an affiliated foreign national, whether or not such debt obligation was guaranteed or assumed by the direct investor.

(7) The complete or partial satisfaction by a direct investor of a long-term foreign borrowing made by the direct investor before or after the effective date of the regulations to the extent the proceeds of the borrowing were expended in making transfers of capital on or after January 1, 1965, or were allocated by the direct investor (on the books and records maintained by the direct investor under §§ 1000.203(b) and 1000.601) to positive direct investment. A transfer of capital resulting from the repayment of a borrowing by a direct investor shall be deemed to have been made to the scheduled area in which such proceeds were expended or to which they were allocated at the time of such repayment and with respect to which a deduction was made under § 1000.203(d)(2), § 1000.203(d)(3), § 1000.306(e), or § 1000.313(d)(1); or if deductions were made in two or more scheduled areas with respect to such repaid borrowing, the transfer shall be apportioned among such scheduled areas in the same proportions as the amount of such deductions in each such scheduled area. If any apportionment made by a direct investor hereunder is determined by the Secretary to be inconsistent with the purposes of this part, the Secretary shall have the right, in his discretion, to make an apportionment consistent with the purposes of this part.

(8) A lease of property by a direct investor to an affiliated foreign national, if the property has a remaining useful life when leased of a year or more and is not required or expected to be returned to the direct investor in less than one year.

(9) A pledge, hypothecation or other transfer by a direct investor of foreign balances (as defined in § 1000.203(a)(1)) or equity securities of a foreign corporation owned by the direct investor (other than equity securities of an affiliated foreign national of the direct investor), which pledge, hypothecation or other transfer is made by the direct investor to or with a foreign national, on or after the effective date of the regulations, pursuant to an express or implied agreement with the foreign national whereby the foreign national transfers or agrees to transfer funds or other property, as a loan or otherwise, to an affiliated foreign national of the direct investor or to the direct investor itself for investment in such an affiliated foreign national: *Provided,* That this subparagraph shall not apply to a pledge, hypothecation or other transfer by a direct investor to a foreign national in connection with a borrowing by the direct investor for investment in an affiliated foreign national, if the borrowing is not a long-term foreign borrowing (as defined in § 1000.324(a)).

(b) *Transfers of capital by affiliated foreign nationals.* Except as otherwise provided in paragraph (c) of this section, a transfer of capital by an affiliated foreign national to a direct investor in such affiliated foreign national means any of the following transactions or occurrences as a result of or in connection with which the affiliated foreign national directly or indirectly acquires or increases a debt or equity interest in the direct investor or the direct investor directly or indirectly disposes of or reduces a debt or equity interest in the affiliated foreign national held by the direct investor:

(1) The acquisition by an affiliated foreign national of an equity interest in or debt obligation of the direct investor.

(2) A contribution by an affiliated foreign national to the capital of the direct investor.

(3) The complete or partial satisfaction by an affiliated foreign national of a debt obligation of the affiliated foreign national held by the direct investor.

(4) The reduction of an equity interest in an affiliated foreign national held by the direct investor (as the result of a redemption of stock, liquidating dividend, or like transaction):

(5) A transfer by the direct investor of an equity interest in or debt obligation of an affiliated foreign national held by the direct investor.

(6) The complete or partial satisfaction by an affiliated foreign national of a debt obligation of the direct investor, whether or not such debt obligation was guaranteed or assumed by the affiliated foreign national.

(c) *Transactions not involving transfer of capital.* Notwithstanding the provisions of paragraphs (a) and (b) of this section, the following shall not be deemed transfers of capital:

(1) (i) An acquisition by a direct investor described in paragraph (a)(1) of this section if the acquisition is from a person within the United States acting for its own account and such person was, immediately prior to the acquisition, a direct investor in the affiliated foreign national. If the acquisition is of an equity interest and the acquiring and divesting

direct investors each file Form FDI–107 on or before the end of the month following the close of the calendar quarter during which the acquisition occurs, direct investment made by the divesting direct investor in 1965, 1966, and the year of the acquisition that corresponds to the interest transferred shall be deemed to have been made by the acquiring direct investor (except that the provisions of §§1000.203(d) (2) and (3), 1000.306(e) (1) and 1000.313(d)(1) shall be disregarded in calculating such direct investment unless the acquiring direct investor shall have assumed the obligation to repay long-term foreign borrowing in connection with which deductions under such sections were made), and annual earnings (as defined in § 1000.504(b)(4)) in 1966, 1967, and the year immediately preceding the year of acquisition that correspond to the interest transferred shall be attributed to the acquiring direct investor.

(ii) A transfer of capital shall not be deemed to occur in connection with or as the result of any combination (by merger, consolidation, reorganization or otherwise) of two or more direct investors. The surviving direct investor shall file Form FDI–107 on or before the end of the month following the close of the calendar quarter during which the combination occurs. The aggregate amount of direct investment made and liquid foreign balances held by each of the direct investors involved in the combination in 1965, 1966, and the year in which the combination occurs shall be deemed to have been made or held by the surviving direct investor, and the aggregate amount of annual earnings (as defined in § 1000.504(b)(4)) of each of the direct investors involved in the combination in 1966, 1967, and the year immediately preceding the year in which the combination occurs shall be attributed to the surviving direct investor.

(2) A transfer described in paragraph (a)(5) of this section unless (i) the transferee is the direct investor or (ii) the transferor or transferee is an affiliated foreign national which is an affiliate of the direct investor as defined in § 1000.903(a).

(3) An acquisition by an affiliated foreign national described in paragraph (b)(1) of this section unless the acquisition is from the direct investor.

(4) A transfer described in paragraph (b)(5) of this section unless the transfer is made (i) to a foreign national or (ii) to a bank or other financial institution certified as subject to the Federal Reserve Foreign Credit Restraint Program and the transfer is charged against the ceiling of such bank or institution under such Program: *Provided,* That on or after July 1, 1972, if the transfer is to a foreign national of a debt obligation and a borrowing from a bank or other financial institution certified as subject to such Program is made by such foreign national in order to enable such transfer, such borrowing is charged against the ceiling of such bank or institution under such Program: *And provided further,* That, if the transfer is of a debt obligation and does not constitute a transfer of capital because of this paragraph, the repayment of such debt obligation by the affiliated foreign national to a person within the United States or to such foreign national shall be deemed a transfer of capital by the affiliated foreign national.

(5) An increase in an equity interest in a corporation resulting from the reinvestment of earnings of such corporation.

(6) An increase or decrease in the value of assets resulting from a reappraisal of such assets.

(7) The making of a guarantee.

(8) The payment by the primary obligor of interest currently due, fees or commissions in connection with borrowings or extensions of credit (including prepayments of interest if such prepayments are made in the course of customary lending practices or commercial transactions).

(9) The payment by the lessee under a lease of real or personal property of rental currently due (including prepayments of rental if such prepayments are customarily made by lessees under leases of the type involved).

(10) The payment by the licensee under a license agreement of royalties currently due (including prepayments of royalties if such prepayments are customarily made by licensees under agreements of the type involved).

(11) A transfer of patents, copyrights, trademarks, trade names, trade secrets, technology, proprietary processes, proprietary information or similar intangibles or any rights or interests therein or applications or contracts relating thereto (each of the foregoing being hereinafter referred to as an intangible), regardless of the form of the transfer or the consideration exchanged therefor: *Provided,* That the foregoing shall not apply to the transfer of an intangible by a direct investor to an affiliated foreign national on or after the effective date if (i) the direct investor had a previously established practice with respect to the exploitation of intangibles of the type so transferred and the transfer represents a substantial departure from such previously established practice and (ii) the intangible transferred was, prior to the transfer, a substantial source of royalty or other like income to the direct investor: *And provided, further,* That, if the transfer of an intangible to an affiliated foreign national does not constitute a transfer of capital under this subparagraph, no deduction for amortization or any like charge with respect to the intangible transferred shall be made against earnings in calculating the earnings of the transferee affiliated foreign national.

(12) A transaction described in paragraph (b)(1) or (3) of this section made on or after July 1, 1972, if a borrowing from a bank or other financial institution certified as subject to the Federal Reserve Foreign Credit Restraint Program is made by the affiliated foreign national or any other foreign national in order to enable such transaction, unless such borrowing is charged against the ceiling of such bank or institution under such Program: *Provided,* That, if the transaction does not constitute a transfer of capital because of this paragraph, the repayment by the affiliated foreign national of such borrowing to such bank or other financial institution, or the repayment by the affiliated foreign national of its borrowing from another foreign national of proceeds of such borrowing from such bank or other financial institution, shall be deemed a transfer of capital by such affiliated foreign national.

(d) The term "debt obligation" or "debt interest" means any item of indebtedness or liability, regardless of the maturity thereof (excluding capital, surplus, and contingency reserves) which would, in accordance with accounting principles generally accepted in the United States, be included in determining total liabilities as of the date on which the existence of a debt obligation or debt interest is to be determined: *Provided,* That a debt obligation or debt interest shall not include the liability of an affiliated foreign national to a direct investor arising out of the declaration of a dividend until such dividend becomes payable on demand.

§ 1000.313 Net transfer of capital.

(a) A net transfer of capital (which may be a positive or negative amount) by a direct investor to all incorporated affiliated foreign nationals in any scheduled area during any period means (1) the aggregate of all transfers of capital made during such period by the direct investor to such affiliated foreign nationals, less (2) the aggregate of all transfers of capital made during such period by such affiliated foreign nationals to the direct investor.

(b) A net transfer of capital (which may be a positive or negative amount) by a direct investor to all unincorporated affiliated foreign nationals in any scheduled area during any period means the direct investor's share of the aggregate net increase or net decrease, during such period, in the aggregate net assets of such affiliated foreign nationals (whether such net increase or decrease results from any transfer of capital (as defined in § 1000.312), earnings, or losses or any combination thereof). In calculating the net assets of all unincorporated affiliated foreign nationals in any scheduled area, there shall be excluded (1) all equity interests in and debt obligations of such unincorporated affiliated foreign nationals held by the direct investor or affiliated foreign nationals of the direct investor in other scheduled areas and (2) all assets of such unincorporated affiliated foreign nationals consisting of equity interests in or debt obligations of the direct investor or affiliated foreign nationals of the direct investor in other scheduled areas.

(c) A net transfer of capital (which may be a positive or negative amount) by a direct investor to all incorporated and unincorporated affiliated foreign nationals in any scheduled area during any period means (1) the net transfer of capital by the direct investor to all incorporated affiliated nationals in such scheduled area during such period, and (2) the net transfer of capital by the

direct investor to all unincorporated affiliated foreign nationals in such scheduled area during such period. If the sum of subparagraphs (1) and (2) of this paragraph is in excess of zero, the net transfer of capital during such period shall be deemed a positive net transfer of capital; if a negative amount, it shall be deemed a negative net transfer of capital.

(d) In calculating the amount of the net transfer of capital made by a direct investor to a scheduled area during any period (including the years 1965 and 1966) pursuant to paragraph (c) of this section:

(1) [Revoked] [1]

(2) There shall be included all transfers of funds or other property as a result of which the direct investor became a direct investor in any affiliated foreign national and all transfers of funds or other property to or on behalf of or for the benefit of such affiliated foreign national made by or on behalf of or for the benefit of such direct investor within 12 months (whether or not during the period for which the calculation is being made) prior to the date of the transfer by which it became a direct investor in such affiliated foreign national, to the same extent as if the direct investor had been a direct investor in such affiliated foreign national during such 12-month period.

(e)(1) In calculating the amount of the net transfer of capital made by a direct investor to all affiliated foreign nationals in any scheduled area during the year 1972, the direct investor may include transfers of capital by incorporated affiliated foreign nationals and decreases in net assets of unincorporated affiliated foreign nationals in such scheduled area that are recognized upon repayments of debt obligations outstanding as of December 31, 1972, by such affiliated foreign nationals to the direct investor during January 1973 or, as alternatively elected by the direct investor, during January and February 1973: *Provided,* That the direct investor has made a worldwide negative net transfer of capital during the period elected under this section: *And provided further,* That the aggregate amount of such transfers of capital and decreases in net assets included in calculating the amounts of the net transfers of capital made by the direct investor during the year 1972 does not exceed the amount of such worldwide negative net transfer of capital.

(2) The worldwide net transfer of capital by a direct investor during the period elected by the direct investor under this section means the algebraic sum of the net transfers of capital by the direct investor to all incorporated and unincorporated affiliated foreign nationals in all scheduled areas during such period.

(3) Any transfer of capital or decrease in net assets that is included in calculating the amount of a net transfer of capital made by a direct investor to all affiliated foreign nationals in any scheduled area during the year 1972 pursuant to this section shall be excluded in calculating the amount of the net transfer of capital made by the direct investor to such affiliated foreign nationals in such scheduled area during the year 1973.

§ 1000.314 Authorization and exemption.

The terms "authorization" and "exemption" mean an authorization or exemption which is set forth in this part or which is issued pursuant to this part.

§ 1000.315 General authorization and exemption.

The terms "general authorization" and "general exemption" mean an authorization or exemption which is set forth in this part or which is issued pursuant to this part and published in the FEDERAL REGISTER.

§ 1000.316 Specific authorization and exemption.

The terms "specific authorization" and "specific exemption" mean an authorization or exemption which is issued pursuant to this part but which is neither set forth in this part nor published in the FEDERAL REGISTER.

§ 1000.317 Domestic bank; foreign bank.

(a) The term "domestic bank" includes any branch or office within the United States of any of the following: (1) A bank or trust company organized under the banking laws of the United States; (2) a private bank or banker subject to supervision and examination under the banking laws of the United States; and (3) a foreign bank described in subparagraph (1) of paragraph (b) of this section.

(b) The term "foreign bank" includes any branch or office within a foreign country of any of the following: (1) A bank, trust company, private bank or merchant bank organized under the laws of a foreign country; and (2) a domestic bank described in subparagraphs (1) or (2) of paragraph (a) of this section.

§ 1000.318 United States.

(a) The term "United States" includes the States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, the Virgin Islands, Guam, Wake Island, American Samoa, and the Trust Territory of the Pacific Islands.

(b) For purposes of this part, a person is organized under the laws of the United States if it is organized under the laws of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or the Trust Territory of the Pacific Islands.

§ 1000.319 Schedule A, B, and C countries.

(a) Schedule A countries are all foreign countries designated as less developed countries in the Executive order, as from time to time in force, issued under section 4916 of the Internal Revenue Code.

(b) Schedule B countries are such other foreign countries as the Secretary may determine to be developed countries in which a high level of capital inflow is essential for the maintenance of economic growth and financial stability, and where those requirements cannot be adequately met from non-U.S. sources. The following countries are hereby determined to fall in this category: Abu Dhabi, Australia, The Bahamas, Bahrain, Bermuda, Canada, Hong Kong, Iran, Iraq, Ireland, Japan, Kuwait, Kuwait-Saudi Arabia Neutral Zone, Libya, New Zealand, Qatar, Saudi Arabia, the United Kingdom, and, commencing with the year 1970, Spain.

(c) Schedule C countries are all foreign countries not included as Schedule A or B countries.

(d) The Secretary may in his discretion, from time to time, transfer any foreign country from any one of the Schedules to another.

§ 1000.320 Effective date.

The term "effective date" means 12:00 noon eastern standard time of January 1, 1968.

§ 1000.321 Year; period.

(a) The term "year" shall mean a calendar year except with respect to a person who has applied for and received the permission provided in paragraph (b) of this section. With respect to such person, the term "year" shall mean such person's fiscal year. The term "period" shall mean any period of time (including a year) on the basis of which compliance with the provisions of this part is or may be measured, or for which reports must be filed pursuant to Subpart F of this part.

(b) A direct investor which customarily maintains its books of account on the basis of a fiscal year other than a calendar year may apply to the Secretary for permission to have its compliance with the provisions of this part measured on the basis of its fiscal year. The Secretary may, in his discretion, grant the application upon a showing of good cause therefor, including a showing that, notwithstanding the granting of such application, the direct investor will substantially comply with the provisions of this part on a calendar year basis. The Secretary may make the grant of the application subject to any terms and conditions that he deems necessary.

§ 1000.322 Person within the United States.

(a) The term "person within the United States" means:

(1) An individual who is a resident of the United States;

(2) An individual, wherever residing, who is a citizen of the United States and the center of whose economic interests is located within the United States;

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[1] All references to § 1000.313(d)(1) refer to that section prior to its revocation effective July 1, 1972. Former § 1000.313(d)(1) read as follows:

"(1) There shall be deducted an amount equal to the proceeds of long-term foreign borrowing actually expended in making transfers of capital to affiliated foreign nationals in such scheduled area during such period."

(3) A corporation or partnership organized under the laws of the United States (excluding a branch of such a corporation or partnership if the branch is a separate foreign national under § 1000.302);

(4) A trust (other than a trust which is deemed a corporation under § 1000.307 (b)) governed by the laws of the United States if the grantor of the trust is, or the person under whose will the trust was created was at the time of his death, a person within the United States;

(5) An estate, if the decedent was a person within the United States at the time of his death;

(6) A domestic bank (as defined in § 1000.317(a));

(7) An affiliated group (as defined in § 1000.903); and

(8) A family group (as defined in § 1000.904).

(b) Notwithstanding the provisions of paragraph (a) of this section, the Secretary retains full power to determine that any person is a person within the United States.

§ 1000.323 International finance subsidiary.

(a) The term "international finance subsidiary" of a direct investor means a corporation organized under the laws of the United States, all the stock of which (disregarding directors' qualifying shares) is owned directly or indirectly by the direct investor, and the principal business of which is to borrow funds from foreign nationals other than affiliated foreign nationals and to invest such funds in debt or equity security of affiliated foreign nationals.

(b) For purposes of this part, a direct investor and all of its international finance subsidiaries shall be considered a single person.

§ 1000.324 Long-term foreign borrowing.

(a) (1) "Foreign borrowing" means a borrowing made by a direct investor on or after May 1, 1970 from any foreign national (other than an affiliated foreign national and except as provided in § 1000.1106), including, but not by way of limitation, an extension of credit by any such foreign national to the direct investor in connection with the purchase of property (including securities) by the direct investor from such foreign national: *Provided,* That (i) the borrowing is from a foreign bank; or (ii) the borrowing is from or is guaranteed by a foreign country or any agency thereof; or (iii) at the time of the borrowing, the debt obligations resulting therefrom would, if purchased by nationals or residents of the United States, be subject to the Interest Equalization Tax (Internal Revenue Code, Chapter 41, sections 4911–4931); or (iv) the lender agrees in writing that, for a period of 3 years from the original date of the borrowing or until final maturity, whichever first occurs, it will not sell or otherwise transfer the debt obligation resulting from the borrowing to a resident or national of the United States (other than a foreign bank described in § 1000.317(b)(2)) or a Canadian person (as defined in § 1000.1101(d)) or to any person who the lender has reason to believe will sell or otherwise transfer the debt obligation to any such U.S. resident or national or Canadian person.

(2) In the case of borrowings made on or after May 1, 1970, "long-term foreign borrowing" means a foreign borrowing (as defined in subparagraph (1) of this paragraph) to the extent that such foreign borrowing is not repaid within 12 months after the original date of the borrowing: *Provided,* That solely for purposes of this subparagraph, a borrowing that is repaid in whole or in part pursuant to provisions in a debt instrument for acceleration upon default or that is repaid by reason of the conversion of convertible debt instruments shall be deemed to have been repaid in accordance with the maturities otherwise provided in such instruments.

(3) In the case of borrowings made prior to May 1, 1970, "long-term foreign borrowing" shall be as defined by paragraphs (a) and (e) of this section as in effect on April 30, 1970.

(b) (1) The refinancing in whole or in part of a foreign borrowing or a long-term foreign borrowing (by renewal, extension, or continuance of such borrowing or by making a foreign borrowing from the same or another lender) shall not, to that extent, be deemed a repayment of the borrowing or the making of a new borrowing.

(2) The delivery of equity securities of a direct investor to holders of debt instruments issued by the direct investor in connection with a long-term foreign borrowing, pursuant to the exercise of conversion or similar rights, shall be deemed a repayment of the borrowing to the extent of the principal amount of indebtedness surrendered by such holders in exchange for such equity securities.

(c) "Proceeds of long-term foreign borrowing" means (1) the gross amount or value (before deducting any discounts, commissions or fees) of funds or other property received by a direct investor from the first purchaser or holder in exchange for the debt obligation issued or created in connection with the borrowing, and reported by the direct investor on its next and all succeeding periodic reports filed with the Office (whether quarterly on Form FDI–102 or annual on Form FDI–102F) for periods during which such borrowing is outstanding, less (2) repayments of principal of such borrowing.

(d) "Available proceeds" means proceeds of long-term foreign borrowing (as defined in paragraph (c) of this section) less (1) amounts allocated to positive direct investment and deducted under § 1000.306(e), and (2) amounts expended prior to July 1, 1972 in transfers of capital to affiliated foreign nationals other than Canadian affiliates as defined in § 1000.1101(a) and deducted under § 1000.313(d)(1).

(e) [Revoked]

§1000.325 Incorporated and unincorporated affiliated foreign nationals. (Proposed but withdrawn prior to adoption; see §1000.304(b)(3)).

Subpart D—Interpretations

§ 1000.401 Reference to amended sections.

Reference to any section of this part or to any regulation, ruling, order, instruction, direction, authorization, license or exemption issued pursuant to this part shall be deemed to refer to the same as currently amended unless otherwise so specified.

§ 1000.402 Effect of amendment of sections of this part or of other orders, etc.

Any amendment, modification, or revocation of any section of this part or of any order, regulation, ruling, instruction, authorization, license, or exemption issued by or under the direction of the Secretary pursuant to 12 U.S.C. 95a, as amended, shall not unless otherwise specifically provided be deemed to affect any act done or omitted to be done, or any suit or proceeding had or commenced in any civil or criminal case, prior to such amendment, modification, or revocation, and all penalties, forfeitures, and liabilities under any such section, order, regulation, ruling, instruction, authorization, license, or exemption shall continue in effect and may be enforced as if such amendment, modification, or revocation had not been made.

§1000.403 Transactions between principal and agent. (REVOKED)

§ 1000.404 Distribution, apportionment or allocation of earnings.

In any case of two or more organizations, trades or businesses owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion or allocate earnings or any component of earnings, if he determines that such distribution, apportionment, or allocation is necessary or appropriate clearly or properly to reflect earnings attributable to a direct investor's interest in affiliated foreign nationals or otherwise to carry out the purposes of this part.

Subpart E—Authorizations or Exemptions

§ 1000.501 Exclusion from authorization or exemption.

(a) No authorization or exemption contained in this part, or issued by or under the direction of the Secretary pursuant to this part, shall be deemed to authorize or validate any direct investment made prior to the issuance thereof, unless such authorization or other exemption specifically so provides.

(b) The Secretary reserves the right to exclude transactions or property or classes thereof from the operation of any authorization or exemption or from the privileges therein conferred, or to restrict the applicability thereof with respect to particular persons. Such action shall be binding upon all persons receiving actual notice or constructive notice thereof.

§ 1000.502 Elections with respect to §§ 1000.503, 1000.504 and 1000.507.

(a) A direct investor shall elect for each year, commencing with the year 1970, to be governed by the provisions of

(1) Section 1000.503, or

(2) Section 1000.504 (a) and (c), or

(3) Section 1000.504(b), or

(4) Section 1000.507.

(b) The election made pursuant to this paragraph shall be binding and effective as to all (and not less than all) scheduled areas and as to the year for which the election is made, and shall be made on Form FDI–102F timely filed by the direct investor pursuant to § 1000.602(b)(3) for the year for which the election is made.

(c) A direct investor that elects to be governed by the provisions of § 1000.507 for any year may not in the immediately following year elect to be governed by the provisions of § 1000.503 without obtaining prior permission of the Secretary.

(d) A direct investor that elects to be governed by the provisions of § 1000.503 for any year, commencing with the year 1970, may not in the immediately following year elect to be governed by the provisions of § 1000.507 without obtaining prior permission of the Secretary.

§ 1000.503 Positive direct investment not exceeding $2,000,000; minimum allowable.

(a) If for any year commencing with the year 1971 a direct investor elects under § 1000.502(a)(1), positive direct investment is authorized for such year in all scheduled areas in an aggregate amount not exceeding $2,000,000.

(b) [Revoked]

(c) If a direct investor elects to make positive direct investment during any year commencing with the year 1969 as authorized under this section, no positive direct investment shall be authorized in such year under § 1000.504 and any positive direct investment which would otherwise have been authorized in such year under § 1000.504 (d), (e), or (f) or § 1000.1302 shall, notwithstanding those provisions, not be authorized in such year or succeeding years.

(d) Positive direct investment made during the year 1968 which was authorized by § 1000.503 as in effect for such year shall reduce the amount of positive direct investment authorized to be made in succeeding years under § 1000.504(f). Such reduction shall first be made in the scheduled area in which such positive direct investment was made, and to the extent that the amount of positive direct investment made in such scheduled area exceeds the amount of positive direct investment authorized to be made in such scheduled area under § 1000.504(f), further reductions shall be made in the amount of positive direct investment authorized under § 1000.504(f) in Schedules C, B, and A, in that order, until such reductions shall equal in the aggregate the total amount of positive direct investment made or the total amount of positive direct investment authorized under § 1000.504(f), whichever is less.

§ 1000.504 Authorized positive direct investment in scheduled areas; schedular allowables.

(a) *Historical allowables.* If for any year commencing with the year 1969 a direct investor elects under § 1000.502(a)(2), positive direct investment for such year is authorized as follows:

(1) In Schedule A, in an amount not exceeding 110 percent of the average of direct investment by the direct investor in Schedule A during the years 1965 and 1966;

(2) In Schedule B, in an amount not exceeding 65 percent of the average of direct investment by the direct investor in Schedule B during the years 1965 and 1966;

(3) In Schedule C, in an amount not exceeding 35 percent of the average of direct investment by the direct investor in Schedule C during the years 1965 and 1966.

(b) *Earnings allowable.* If for any year commencing with the year 1971 a direct investor elects under § 1000.502(a)(3), positive direct investment for such year is authorized as follows:

(1) In Schedule A, in an amount not exceeding 40 percent of the annual earnings of the direct investor in Schedule A during the immediately preceding year.

(2) In Schedule B, in an amount not exceeding 40 percent of the annual earnings of the direct investor in Schedule B during the immediately preceding year;

(3) In Schedule C, in an amount not exceeding 40 percent of the annual earnings of the direct investor in Schedule C during the immediately preceding year.

(4) The term "annual earnings" means the algebraic sum of a direct investor's share of total earnings or total losses during a year of all the direct investor's incorporated affiliated foreign nationals in a scheduled area (excluding Canadian affiliates as defined in § 1000.1101(a) from Schedule B) determined in accordance with the provisions of § 1000.306(c) and the direct investor's share of net earnings or losses during such year of all the direct investor's unincorporated affiliated foreign nationals in such scheduled area (excluding Canadian affiliates as defined in § 1000.1101(a) from Schedule B) determined in accordance with accounting principles generally accepted in the United States consistently applied: *Provided,* That annual earnings of less than zero shall for purposes of this section be treated as zero.

(c) *Adjustment to historical allowable.* If for any year commencing with the year 1971 a direct investor elects under § 1000.502(a)(2),

(1) The amount of positive direct investment authorized in Schedule C under paragraph (a)(3) of this section shall be increased by the lesser of either the amount by which 40 percent of annual earnings in Schedule C during the immediately preceding year is in excess of positive direct investment authorized in Schedule C under said paragraph (a)(3) during the current year or the amount of positive direct investment authorized in Schedule A under paragraph (a)(1) of this section: *Provided,* That the amount of positive direct investment authorized in Schedule A under said paragraph (a)(1) shall be reduced by the amount of such increase:

(2) The amount of positive direct investment authorized in Schedule C under paragraph (a)(3) of this section shall be increased by the lesser of either the amount by which 40 percent of annual earnings in Schedule C during the immediately preceding year is in excess of positive direct investment authorized in Schedule C under paragraph (a)(3) of this section and subparagraph (1) of this paragraph during the current year or the amount of positive direct investment authorized in Schedule B under paragraph (a)(2) of this section: *Provided,* That the amount of positive direct investment authorized in Schedule B under said paragraph (a)(2) shall be reduced by the amount of such increase; and

(3) The amount of positive direct investment authorized in Schedule B under paragraph (a)(2) of this section shall be increased by the lesser of either the amount by which 40 percent of annual earnings in Schedule B during the immediately preceding year is in excess of positive direct investment authorized in Schedule B under said paragraph (a)(2) during the current year or the amount of positive direct investment authorized in Schedule A under paragraph (a)(1) of this section (calculated after the reduction provided in subparagraph (1) of this paragraph): *Provided,* That the amount of positive direct investment authorized in Schedule A under paragraph (a)(1) of this section shall be reduced by the amount of such increase.

(d) *Carryforward allowables and use of schedular allowables in other scheduled areas.* (1) If, during any year commencing with the year 1969, the amount of positive direct investment authorized to a direct investor in Schedule A under paragraphs (a)(1) and (c) of this section or paragraph (b)(1) of this section exceeds the amount of direct investment (whether positive or negative) made by the direct investor during such year in Schedule A, or if no positive direct investment is so authorized to the direct investor in Schedule A during such year but the direct investment by the direct investor in Schedule A during such year is negative, the direct investor is authorized to make additional positive direct investment in Schedule A during succeeding years in an aggregate amount of not more than the amount of such excess, or the amount of such negative direct investment, as the case may be.

(2) If, during any year commencing with the year 1969, the amount of positive direct investment authorized to a direct investor in Schedule B under paragraphs (a)(2) and (c) of this section or paragraph (b)(2) of this section exceeds the amount of direct investment (whether positive or negative) made by the direct investor during such year in Schedule B, or if no positive direct investment is so authorized to the direct investor in Schedule B during such year

but the direct investment by the direct investor in Schedule B during such year is negative, the direct investor is authorized to make additional positive direct investment in Schedule A during such year, and, to the extent additional positive direct investment in Schedule A is not made during such year the direct investor is authorized to make additional positive direct investment in Schedules A and B during succeeding years: *Provided,* That the aggregate amount of additional positive direct investment authorized by this subparagraph shall not be more than the amount of such excess, or the amount of such negative direct investment, as the case may be.

(3) If, during any year commencing with the year 1969, the amount of positive direct investment authorized to a direct investor in Schedule C under paragraphs (a)(3) and (c) of this section or paragraph (b)(3) of this section exceeds the amount of direct investment (whether positive or negative) made by the direct investor during such year in Schedule C, or if no positive direct investment is so authorized to the direct investor in Schedule C during such year but the direct investment by the direct investor in Schedule C during such year is negative, the direct investor is authorized to make additional positive direct investment in Schedule A or B during such year, and, to the extent additional positive direct investment in Schedules A or B is not made during such year, the direct investor is authorized to make additional positive direct investment Schedules A, B, or C during succeeding years: *Provided,* That the aggregate of additional positive direct investment authorized by this subparagraph shall not be more than the amount of such excess, or the amount of such negative direct investment, as the case may be.

(e) *Schedule C total losses; reinvestment allowable.* If the incorporated affiliated foreign nationals of a direct investor in Schedule C have total losses during any year commencing with the year 1969 (calculated as provided in § 1000.306(c)), such losses shall, for purposes of this section, be disregarded in calculating the direct investment (whether positive or negative) made by the direct investor in Schedule C for such year: *Provided,* That the direct investor shall be authorized to reinvest additional earnings of incorporated affiliated foreign nationals in Schedule C during succeeding years in an aggregate amount of not more than the direct investor's share of such total losses.

(f) *Carryforward allowables from 1968.* (1) A direct investor authorized under former § 1000.504(b)(1), as in effect on December 31, 1968, to make positive direct investment in Schedule A during 1969 is authorized to make positive direct investment in Schedule A during 1969 and succeeding years in an aggregate amount not to exceed the amount of positive direct investment so authorized to be made during 1969 under said former § 1000.504(b)(1).

(2) A direct investor authorized under former § 1000.504(b)(2), as in effect on December 31, 1968, to make positive direct investment in Schedule B during 1969 is authorized to make positive direct investment in Schedules A or B during 1969 and succeeding years in an aggregate amount not to exceed the amount of positive direct investment so authorized to be made during 1969 under said former § 1000.504(b)(2).

(3)(i) A direct investor authorized to make positive direct investment, to make a positive net transfer of capital, or to reinvest additional earnings of incorporated affiliated foreign nationals under former § 1000.504(c) (1) and (2), as in effect on December 31, 1968, is authorized to make positive direct investment in Schedules A, B, or C during 1969 and succeeding years in an aggregate amount not to exceed the aggregate amount of positive direct investment, positive net transfer of capital, and additional reinvested earnings so authorized to be made under said former § 1000.504 (c) (1) and (2).

(ii) A direct investor authorized under former § 1000.504(c)(3), as in effect on December 31, 1968, to reinvest earnings of incorporated affiliated foreign nationals in Schedule C during 1969 shall be authorized to reinvest earnings of incorporated affiliated foreign nationals in Schedule C during 1969 or succeeding years in an aggregate amount not to exceed the amount of earnings so authorized to be reinvested during 1969 under said former § 1000.504(c)(3).

§ 1000.505 Transfers between affiliated foreign nationals.

(a) (1) For purposes of the succeeding provisions of this § 1000.505, (i) if funds or other property are transferred by an unincorporated affiliated foreign national of a direct investor to the direct investor or to another affiliated foreign national of the direct investor, the funds or property shall, if the transferee is not the immediate parent of the transferor affiliated foreign national, be treated as having been transferred by such immediate parent and (ii) if funds or other property are transferred to an unincorporated affiliated foreign national of a direct investor by the direct investor or by another affiliated foreign national of the direct investor, the funds or property shall, if the transferor is not the immediate parent of the transferee affiliated foreign national, be treated as having been transferred to such immediate parent: *Provided, in each case,* That the immediate parent is the direct investor or an incorporated affiliated foreign national of the direct investor and that such immediate parent is not the immediate parent of both the transferor and transferee affiliated foreign national.

(2) For purposes of §§ 1000.312 and 1000.313(a), (i) if funds or other property are deemed under subparagraph (1)(ii) of this paragraph to have been transferred by an incorporated affiliated foreign national of a direct investor to the direct investor, the transfer shall be treated as a transfer of capital by the incorporated affiliated foreign national to the direct investor (in an amount equal to the full amount or value of the funds or property so transferred) and (ii) if funds or other property are deemed under subparagraph (1)(i) of this paragraph to have been transferred by the direct investor to an incorporated affiliated foreign national of the direct investor, the transfer shall be treated as a transfer of capital by the direct investor to the incorporated affiliated foreign national (in an amount equal to the full amount or value of the funds or property so transferred): *Provided, in each case,* That either the affiliated foreign national actually transferring the funds or other property or the affiliated foreign national actually receiving such funds or other property is an affiliate of the direct investor as defined in § 1000.903(a) and that the transfer, if actually made by or to the direct investor, as the case may be, would have constituted a transfer of capital under § 1000.312.

(3) For purposes of §§ 1000.312 (a) and (b) and 1000.313(a), if funds or other property are transferred (or deemed under paragraph (a)(1) to have been transferred) by an incorporated affiliated foreign national of a direct investor to another incorporated affiliated foreign national of such direct investor, the transfer shall be treated as a transfer of capital by the transferor affiliated foreign national to the direct investor (in an amount equal to the full amount or value of the funds or property so transferred) and as a further transfer of capital in an equivalent amount by the direct investor to the transferee affiliated foreign national: *Provided,* That the affiliated foreign national actually transferring the funds or other property or the affiliated foreign national actually receiving such funds or other property is an affiliate of the direct investor as defined in § 1000.903(a) and that the transfer, if actually made by the direct investor, would have constituted a transfer of capital under § 1000.312(a): *And provided further,* That a charter of a vessel by an incorporated affiliated foreign national of such direct investor shall not be subject to this subparagraph.

(4) In calculating the net transfer of capital made by a direct investor during any period to all unincorporated affiliated foreign nationals in a scheduled area under § 1000.313(b), the direct investor shall be deemed not to have any share in a net increase or decrease in the net assets of an unincorporated affiliated foreign national in the scheduled area if the immediate parent of such unincorporated affiliated foreign national is not the direct investor or an affiliate of the direct investor as defined in § 1000.903(a).

(5) For purposes of §§ 1000.312(a) and 1000.313(a), if an unincorporated affiliated foreign national of a direct investor has a net decrease in its net assets during any period, the direct investor shall be deemed to have made a transfer of capital to the immediate parent of such unincorporated affiliated foreign national to the extent that the direct investor's share of such net decrease is not attributable to losses incurred by the unincorporated affiliated foreign national during such period: *Provided,* That such immediate parent is an incorporated affiliated foreign national and is an affiliate of the direct investor as defined in § 1000.903(a).

(6) For purposes of §§ 1000.312(b) and 1000.313(a), (i) if an unincorporated affiliated foreign national of a direct investor has a net increase in its net assets during any period, the immediate parent of such unincorporated affiliated foreign national shall be deemed to have made a transfer of capital to the direct investor to the extent that the direct investor's share of such net increase is not attributable to earnings of the unincorporated affiliated foreign national during such period, and (ii) if an unincorporated affiliated foreign national of a direct investor incurs a loss during any period but such unincorporated affiliated foreign national has no change or has a net increase in its net assets during such period, or has a net decrease in its net assets during such period but the loss exceeds the net decrease in net assets, the immediate parent of such unincorporated affiliated foreign national shall be deemed to have made a transfer of capital to the direct investor in an amount equal to (*a*) the direct investor's share of the loss, (*b*) the direct investor's share of the net increase in net assets plus the direct investor's share of the loss or (*c*) the amount by which the direct investor's share of the loss exceeds the direct investor's share of the net decrease in net assets, as the case may be: *Provided, in each case,* That the immediate parent of the unincorporated affiliated foreign national is an incorporated affiliated foreign national and is an affiliate of the direct investor as defined in § 1000.903(a).

(b) Notwithstanding anything to the contrary contained in paragraph (a) of this section, a trade credit extended by one affiliated foreign national of a direct investor to another affiliated foreign national of such direct investor in the ordinary course of business pursuant to arm's-length terms shall not be deemed a transfer of capital by the direct investor to the affiliated foreign national receiving the credit nor a transfer of capital by the affiliated foreign national extending the credit to the direct investor if the obligation is in fact paid within 12 months after extension of the credit, in which event payment of the obligation shall not be deemed a transfer of capital by the direct investor to the affiliated foreign national receiving payment nor a transfer of capital by the affiliated foreign national making payment to the direct investor. If the affiliated foreign national extending or receiving the credit is an unincorporated affiliated foreign national of the direct investor and the obligation is in fact paid within 12 months, any change in the net assets of the unincorporated affiliated foreign national attributable to the transaction shall not be taken into account under § 1000.313(b) in calculating the net transfer of capital made by the direct investor to all unincorporated affiliated foreign nationals in the scheduled area in which such unincorporated affiliated foreign national is located.

(c) For purposes hereof, the immediate parent of a partnership referred to in § 1000.304(a)(1) is the direct investor or affiliated foreign national which is the partner, the immediate parent of a business venture referred to in § 1000.304(a)(2) is the direct investor, and the immediate parent of a business venture referred to in § 1000.304(a)(3) is the corporation or partnership on whose behalf the business venture is conducted.

§ 1000.506 Additional authorized positive direct investment in any one or more scheduled areas; incremental earnings allowable.

(a) For the purposes of this section:

(1) The term "aggregate annual earnings" means the algebraic sum of a direct investor's annual earnings in all scheduled areas as defined in § 1000.504(b)(4).

(2) The term "base period aggregate annual earnings" means an amount equal to 50 percent of the sum of the aggregate annual earnings for the years 1966 and 1967: *Provided,* That the base period aggregate annual earnings shall in no event be less than zero.

(3) The term "incremental earnings" means, with respect to each year beginning with the year 1970, the amount, if any, by which the aggregate annual earnings for such year exceed the base period aggregate annual earnings.

(4) The term "incremental earnings allowable" means, with respect to each year beginning with the year 1970 in which there are incremental earnings, the amount by which 40 percent of the incremental earnings for such year exceeds the greatest of the following (computed without regard to the reduction provisions of § 1000.1003 or any authorization, exemption, ruling, compliance settlement or order, and without regard to any election made under § 1000.502(a)): (i) The amount of positive direct investment authorized to be made by the direct investor during such year in all scheduled areas under § 1000.503, or (ii) the amount of positive direct investment, if any, authorized to be made by the direct investor during such year in all scheduled areas under § 1000.504(a)(1), (2), and (3), or (iii) the amount of positive direct investment, if any, authorized to be made by the direct investor during such year in all scheduled areas under § 1000.504(b)(1), (2), and (3).

(b) For any year, commencing with the year 1970, a direct investor that elects under § 1000.502(a)(1) may make additional positive direct investment in excess of that authorized by § 1000.503 in all scheduled areas in an aggregate amount not exceeding the direct investor's incremental earnings allowable for such year.

(c) For any year, commencing with the year 1970, a direct investor that elects under § 1000.502(a)(2) or (3) or (4) may make additional positive direct investment in excess of that authorized by § 1000.504 or § 1000.507 in any scheduled area in an amount not exceeding the direct investor's incremental earnings allowable for such year: *Provided,* That the aggregate of positive direct investment made pursuant to this paragraph in all scheduled areas shall not exceed the incremental earnings allowable. A direct investor that elects § 1000.504 shall compute additional positive direct investment made in Schedule C for such year pursuant to this section in accordance with § 1000.504(e).

(d) If, during any year commencing with the year 1970, the incremental earnings allowable authorized to a direct investor exceeds the aggregate of additional positive direct investment made in all scheduled areas pursuant to paragraph (b) or (c) of this section, the direct investor is authorized to make additional positive direct investment, during succeeding years, in the same manner as provided in paragraphs (b) and (c) of this section, in an aggregate amount not exceeding such excess.

§ 1000.507 Alternative minimum and Schedule A supplemental allowable.

(a) If for any year commencing with the year 1971 a direct investor elects under § 1000.502(a)(4), positive direct investment for such year is authorized as follows:

(1) In Schedules B and C in an aggregate amount not exceeding $2,000,000; and

(2) In Schedule A in an amount not exceeding $4,000,000.

(b) If during any year commencing with the year 1970 the aggregate amount of positive direct investment authorized to a direct investor in Schedules B and C under paragraph (a)(1) of this section exceeds the aggregate amount of direct investment (whether positive or negative) made by the direct investor during such year in Schedules B and C, the direct investor is authorized to make additional positive direct investment in Schedule A during the same year in an aggregate amount of not more than the amount of such excess.

(c) If a direct investor elects to make positive direct investment during any year commencing with the year 1970 as authorized under this section, no positive direct investment shall be authorized in such year under § 1000.504 and any positive direct investment which would otherwise have been authorized in such year under § 1000.504 (d), (e), or (f) or § 1000.1302 shall, notwithstanding those provisions, not be authorized in such year or succeeding years.

Subpart F—Records and Reports

§ 1000.601 Records.

Every person subject to the provisions of this part shall keep in the United States a full and accurate record of each transaction engaged in by it which is subject to the provisions of this part, regardless of whether such transaction is effected pursuant to authorization or otherwise, and of every other transaction between such person and an affiliated foreign national. Such records (including, but not limited to, source materials, journals or other books of original entry, ledgers, financial statements, work papers, regardless of by whom prepared, and minute books) shall be retained for at least 3 years after the date of the filing of any report relating to or containing information concerning such transaction, whether or not the transaction is individually identified. Records relating

to transactions with respect to which there is no reporting requirement shall be retained for at least 3 years after the filing of the annual report relating to the year in which such transactions occurred.

§ 1000.602 Reports.

(a) Every person is required to furnish under oath, in the form of reports or otherwise, from time to time and at any time as may be required by the Secretary, complete information relative to any transaction with respect to which records are required to be kept under this part or information otherwise reasonably related to direct investment or the purposes of Executive Order 11387 or of this part. The Secretary may require that such reports include the production of any books of account, contracts, letters, or other papers, relevant to direct investment or transactions related thereto in the custody or control of persons required to make such reports. Complete information with respect to transactions related to direct investment may be required either before or after such transactions are completed. The Secretary may, through any person or agency, investigate any such transaction or any violation of the provisions of this part, regardless of whether any report has been required or filed in connection therewith.

(b) In addition to such other reports as may be required under paragraph (a) of this section, the following reports are required to be filed by direct investors with the Office of Foreign Direct Investments, Department of Commerce, Washington, D.C. 20230:

(1) *Form FDI–101, Base Period Report.* Each direct investor must file this report on or before the end of the month following the close of the calendar quarter during which it becomes a direct investor, unless the direct investor is exempt from filing as provided in the instructions to this report. If an exemption from filing ceases to apply to a direct investor, such direct investor must file this report on or before the end of the month following the close of the calendar quarter during which the exemption ceases to apply.

(2) *Form FDI–102, Cumulative Quarterly Report.* Each direct investor must file this report (on Form FDI–102/102F) within 45 days after the close of each quarter of the calendar year, unless such filing is waived by OFDI or the direct investor is exempt from filing as provided in the instructions to this report.

(3) *Form FDI–102F, Annual Report.* Each direct investor must file this report (on Form FDI–102/102F) for each year on or before April 30 of the succeeding year, unless the direct investor is exempt from filing a Base Period Report on Form FDI–101 as provided in the instructions to such report.

(4) *Form FDI–102F/S, Annual Report: Short Form.* If a direct investor elects pursuant to § 1000.502(a) (1) or (4) to be governed by the provisions of § 1000.503 or § 1000.507 and satisfies other criteria specified in the instructions to this report, it may file its Annual Report on Form FDI–102F/S in lieu of Form FDI–102F on or before April 30 of the year succeeding the year for which the report is filed.

(5) *Form FDI–105, AFN Financial Structure and Related Data.* Each direct investor must file this report on or before the date specified in the instructions to this report and published in the FEDERAL REGISTER at the time the form is distributed or made available.

(6) *Form FDI–106, Standard Certificate for Repayment of Borrowings Made on or after May 1, 1970.* In order for positive direct investment resulting from the repayment of borrowing made by a direct investor or its affiliated foreign national to be authorized under Subpart J of this part, a certificate on Form FDI–106 must be filed not later than 10 days after the direct investor makes the borrowing or guarantees the borrowing by its affiliated foreign national.

(7) *Form FDI–107, Adjusted 1965–67 Base Period and Prior Years' Annual Earnings Report for DIs Engaging in § 312(c)(1) Transactions.* If the filing of Forms FDI–107 is elected under § 1000.312(c)(1)(i), this report must be filed by the acquiring and divesting direct investors on or before the end of the month following the close of a calendar quarter during which the acquisition occurred. The surviving direct investor is required by § 1000.312(c)(1)(ii) to file this report on or before the end of the month following the close of the calendar quarter during which a combination of direct investors occurred.

(c) Applications for extensions of time in which to file reports shall be made to the Office of Foreign Direct Investments and must be received by the Office prior to the time such reports are due. Applications shall contain a statement of reasons for inability to report on time. An extension of time will be given for good cause shown.

(d) Reports mailed to the Office are deemed filed on the date post-marked on the envelope in which they are mailed. Reports delivered directly to the Office are deemed filed when received as evidenced by the Office's date stamp thereon.

(e) Copies of all necessary forms, and instructions as to their preparation and filing, may be obtained from the Office of Foreign Direct Investments, Department of Commerce, Washington, D.C. 20230, or from any Field Office of the Department.

Subpart G—Penalties

§ 1000.701 Penalties.

(a) Attention is directed to 12 U.S.C. 95a, which provides in part:

> Whoever willfully violates any of the provisions of this section or of any license, order, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than 10 years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this section the term "person" means an individual, partnership, association, or corporation.

This section is applicable to violations of any provision of this part and to violations of the provisions of any license, ruling, regulation, order, direction or instruction issued by or pursuant to the direction or authorization of the Secretary pursuant to this part or otherwise under such section.

(b) Attention is also directed to 18 U.S.C. 1001, which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 1000.702 Effect upon lenders.

Any person (other than an affiliated foreign national of a direct investor) who lends money or extends credit to such direct investor or to an affiliated foreign national of such direct investor and who does not have actual knowledge, when such loan is made or credit extended (or when a commitment is given to make the loan or extend the credit), that the use of the proceeds thereof, the repayment thereof or any other transaction in connection therewith will involve or constitute a violation by the direct investor of any provision of this part or of any license, ruling, regulation, order, direction or instruction issued by or pursuant to the authorization or direction of the Secretary pursuant to this part or otherwise under § 1000.701, may receive repayment thereof (together with all interest and other fees and charges) and otherwise participate in any other transaction in connection therewith without being subject to the penalties referred to in § 1000.701(a), and such person's rights against the direct investor or affiliated foreign national in connection with such loan or extension of credit shall not in any way be affected or impaired by reason of the provisions of this part.

Subpart H—Procedures

§ 1000.801 Applications for specific authorizations and exemptions.

(a) *Filing.* Transactions subject to the prohibitions contained in this part which are not generally authorized may be effected only under specific authorization. Persons subject to the requirements of this part may be exempted from complying with any requirement thereof only through a specific exemption. Any person may file an application for specific authorization or for specific exemption. Such applications shall contain all relevant information and shall be filed in triplicate with the Director, Office of Foreign Direct Investments, Department of Commerce, Washington, D.C. 20230. An applicant may furnish additional information or present views concerning the application at any time before a decision has been rendered thereon. The application may include a request that the Director, in his discretion, grant the ap-

plicant a conference with the Director or his designee.

(b) *Decisions.* Written notice of action taken on an application shall be given to the applicant. Whenever an application is denied, such notice shall include a brief statement of the grounds therefor.

§ 1000.802 Petitions for reconsideration; appeals.

This section sets forth the procedures applicable to (1) petitions to the Director for reconsideration of administrative actions and (2) appeals to the Foreign Direct Investments Appeals Board (the "Board") from administrative actions and decisions on petitions for reconsideration.

(a) *General provisions.* (1) The term "administrative action" means, with respect to any person, (i) a decision upon an application for a specific authorization or exemption filed by such person, or (ii) any action taken specifically with respect to such person pursuant to the exercise of a discretionary power by the Secretary in accordance with any provision of this part. The term "administrative action" does not include an opinion or ruling interpreting the regulations, or a decision upon a petition for reconsideration or upon an appeal.

(2) Notice of an administrative action or of a decision rendered upon a petition for reconsideration or upon an appeal shall be deemed to have been given on the date when mailed or delivered to the petitioner or appellant: *Provided,* That notice of an administrative action taken prior to the effective date of this section shall be deemed to have been given on such effective date.

(3) A petition for reconsideration shall be deemed filed on the date received by the Office of Foreign Direct Investments. An appeal shall be deemed filed on the date received by the secretary of the Board.

(4) Any person may withdraw a petition for reconsideration or an appeal at any time prior to the date a decision is rendered thereon.

(b) *Petitions for reconsideration.* Any person may petition for reconsideration of an administrative action taken with respect to such person unless such person has previously appealed the same or a related administrative action to the Board and such appeal is then pending or a decision has been rendered thereon. The filing of a petition for reconsideration shall not suspend or stay the effect of the administrative action of which reconsideration is sought unless the Director, in his discretion, so orders.

(1) *Form of petitions.* An original and five copies of the petition for reconsideration and all supporting documents shall be submitted. The petition shall enclose a copy of the administrative action of which reconsideration is asked, and shall state the grounds upon which the petition is based and the relief requested. All facts and argument in support of the petition shall be separately identified and set forth in detail.

(2) *Filing.* A petition for reconsideration of an administrative action shall be filed not later than 20 days after notice of the administrative action is given to the petitioner. It shall be addressed to the Director, Office of Foreign Direct Investments, Ref.: "Petition for Reconsideration," U.S. Department of Commerce, Washington, D.C. 20230. If a petition is withdrawn, the time which has elapsed since notice of the administrative action was given to the petitioner shall not be counted as part of the time allowed for appeal. Requests for extension of time within which to file petitions for reconsideration may be granted in the discretion of the Director.

(3) *Conferences.* The petition may include a request that the Director, in his discretion, grant an informal conference with the Director or his designee.

(4) *Decisions.* The Director may dismiss the petition, may grant or deny the petition in whole or in part, or may modify all or part of the administrative action under reconsideration. Written notice of the decision shall be given to the petitioner.

(c) *Appeals*—(1) *Foreign Direct Investment Appeals Board.* The Foreign Direct Investment Appeals Board is established in the Office of the Secretary. The Secretary of Commerce (without power of delegation) shall appoint three responsible officials of the Department of Commerce, none of whom shall be employees of the Office of Foreign Direct Investments, to serve as members of the Board. The Board may, in its discretion, establish rules of procedure in addition to those set forth in this section. Any person may appeal in writing to the Board on the ground that an administrative action or a decision on petition for reconsideration with respect to such person resulted in unusual hardship upon appellant and is inconsistent with achievement of the goals and objectives of Executive Order 11387 and this part. An appeal may not be filed if such person has previously filed a petition for reconsideration respecting the same or a related administrative action and no decision has been rendered thereon or the petition has not been withdrawn. The filing of an appeal shall not suspend or stay the effect of the administrative action or decision on the petition for reconsideration under appeal unless the Board, in its discretion, so orders.

(2) *Form of appeals.* An original and ten copies of the appeal and all supporting documents shall be submitted. The appeal shall enclose a copy of the administrative action or decision on the petition for reconsideration from which appeal is made, and shall state the particulars upon which the appeal is based and the relief requested. All facts and argument in support of the appeal shall be separately identified and set fortn in detail. The Board may, in its discretion, request an appellant to make an oral presentation to the Board or any member thereof, at a time and place designated by the Board.

(3) *Filing.* Appeals shall be filed with the Board not later than 30 days after notice of the administrative action or decision on the petition for reconsideration has been given to the appellant. Requests for extensions of time within which to file appeals may be granted in the discretion of the Board. Appeals shall be addressed to the Secretary, Foreign Direct Investment Appeals Board, U.S. Department of Commerce, Washington, D.C. 20230.

(4) *Decisions.* The Board may dismiss, grant or deny the appeal in whole or in part or modify all or part of the administrative action or decision on the petition for reconsideration under appeal. Written notice of the Board's decision shall be furnished to the appellant and shall constitute final Departmental action.

§ 1000.803 Proof of authority to file certain documents.

An application for a specific authorization or exemption, a request for an interpretative opinion, a petition for reconsideration or an appeal will not be considered unless in the case of:

(a) A corporation, partnership, trust, or other unincorporated entity, it is executed by a corporate officer, general partner, trustee, or other duly authorized person who shall certify his authority to act on behalf of the entity;

(b) A natural person, it is executed and acknowledged by him; or

(c) Submission by an attorney or agent on behalf of any person, it is accompanied by a duly authorized power of attorney.

§ 1000.804 Amendment, modification, or revocation.

The provisions of this part and any rulings, exemptions, authorizations, instructions, waivers, orders, or forms issued under this part may be amended, modified, or revoked at any time. Unless the Secretary otherwise specifies, the public interest requires that such amendments, modifications, or revocations be made without prior notice.

§ 1000.805 Rules governing availability of information.

Completed Forms FDI–101, –102, –102F, –103, –104, –105, –106 or any other completed forms filed with the Office, applications and requests for specific authorizations exemptions or interpretations, petitions for reconsideration, appeals, materials submitted thereunder, and decisions thereon are considered to be matters covered by 5 U.S.C. 552(b). Other information, records, and material of the Office of Foreign Direct Investments if required by 5 U.S.C. 552 to be made available to the public shall be available in accordance with the provisions of Department Order 64 of the Secretary of Commerce (32 F.R. 9643, July 4, 1967) and in accordance with the provisions of Part 4 of this title (32 F.R. 9643, July 4, 1967).

§ 1000.806 Delegations.

Any function, duty or authority under this part may be performed or exercised by the Secretary or any person, agency or instrumentality designated by him (directly or indirectly by one or more redelegations of authority); and the term "Secretary," as used in this part, shall include any such designated person, agency, or instrumentality, as applicable.

Subpart I—Direct and Indirect Interests; Affiliated, Associated and Family Groups; Ownership of Direct Investors; Rules for Reporting

§ 1000.901 Direct interests.

A direct interest in a person is an interest which is not owned through an intervening person or chain of persons. The amount of a direct interest owned by one person in another person is calculated according to the following rules:

(a) The amount of a direct interest owned by a person in a corporation is the percentage of the total combined voting power of all outstanding securities of the corporation possessing voting power represented by such securities which are beneficially owned by such person or in respect of which such person beneficially owns voting trust certificates, depositary receipts or other similar instruments representing such securities. Voting power means the power presently to vote in the election of the directors of the corporation or, if the corporation does not have directors, in the election or appointment of persons performing management functions or functions supervisory of management.

(b) The amount of a direct interest owned by a person in a partnership, trust, or business venture which is not a corporation is such person's percentage share in the profits of such organization: *Provided,* That if an interest in any such organization shall entitle the owner to a fixed amount out of, rather than a percentage of profits, or another arrangement is in effect which may cause the interest in profits to vary in accordance with future conditions or contingencies, the interest shall be calculated by reference to the proportion of the profits of the organization actually distributed or distributable to such person at the close of the most recent annual accounting period of the organization.

(c) If the rules set forth in paragraphs (a) or (b) of this section are not applicable to a particular corporation, partnership, trust or business venture in which such person owns an interest, the amount of the interest shall be calculated by any reasonable method which fairly reflects the amount thereof.

§ 1000.902 Indirect interests.

An indirect interest in a person is an interest owned through ownership of an intervening person or chain of persons. The amount of an indirect interest owned by one person in another person is calculated by multiplying together the direct interests of each person in the chain in each person in the chain (treating stock of a higher tier corporation held by a lower tier corporation as not outstanding).

§ 1000.903 Affiliated groups.

(a) For purposes of paragraph (b) of this section, an "affiliate" of a person within the United States means any other person (other than an individual), wheresoever located, in which the aggregate of direct interests owned by such person within the United States and any affiliate or affiliates (as herein defined) of such person exceeds 50 percent.

(b) An "affiliated group" means a person within the United States and all of its affiliates which are persons within the United States; such person and such affiliates are members of the affiliated group. Any person which owns a direct or indirect interest in a member of an affiliated group but which is not itself a member thereof shall be deemed to own a direct or indirect interest, as the case may be, in the affiliated group.

(c) Except as provided in § 1000.906 (b)(1), the members of an affiliated group shall, for all purposes of this part, be considered a single person within the United States.

(d) An affiliated group shall file reports under § 1000.602 in the manner provided in § 1000.907.

§ 1000.904 Family groups.

(a) For all purposes of this part, an individual who is a person within the United States, his spouse (unless legally separated), and all relatives of such individual or his spouse residing with such individual shall be considered a single person within the United States.

(b) A family group shall file reports under § 1000.602 in the manner provided in § 1000.907.

§ 1000.905 Associated groups.

(a) An "associated group" consists of two or more persons within the United States (one or all of which may be an affiliated or family group) which, pursuant to an express or implied agreement or understanding, act in concert to own or acquire interests in the same corporation or partnership organized under the laws of a foreign country or in the same business venture conducted within a foreign country: *Provided,* That, the interests are not owned or acquired through a corporation, partnership (other than a joint venture) or trust which is a person within the United States (without regard to whether the corporation, partnership, or trust is organized or created for the purpose of owning or acquiring such interests); *And provided further,* That the aggregate of such interests would, if owned or acquired by only one of such persons, cause such person to be a direct investor in the corporation, partnership, or business venture under § 1000.305.

(b) (1) Notwithstanding the provisions of § 1000.305, each member of an associated group shall be deemed a direct investor in the corporation, partnership, or business venture in which the interests are owned or acquired (hereinafter referred to as the "group affiliated foreign national") for all purposes of this part: *Provided,* That, a person which is a direct investor by virtue of this paragraph (b)(1) but not by virtue of the provisions of § 1000.305 shall not be subject to the provisions of § 1000.203.

(2) (i) Notwithstanding the provisions of § 1000.503, positive direct investment made during any year, commencing with the year 1970, by members of an associated group that elect § 1000.503 in group affiliated foreign nationals of the associated group shall not be authorized by § 1000.503, unless the aggregate of direct investment made during the year by all such members (being considered for purposes of this subdivision as a single direct investor) in all group affiliated foreign nationals would have been authorized by § 1000.503.

(ii) Notwithstanding the provisions of § 1000.507, positive direct investment made during any year, commencing with the year 1970, by members of an associated group that elect § 1000.507 in group affiliated foreign nationals of the associated group shall not be authorized by § 1000.507, unless the aggregate of direct investment made during the year by all such members (being considered for purposes of this subdivision as a single direct investor) in all group affiliated foreign nationals would have been authorized by § 1000.507.

(iii) If one or more members of an associated group elect § 1000.503 and one or more other members of the group elect § 1000.507, for any year commencing with the year 1971, positive direct investment by such members in group affiliated foreign nationals shall not be authorized by § 1000.503 or § 1000.507, unless the algebraic sum of the following is not in excess of $2 million: Aggregate direct investment made during the year pursuant to § 1000.503 in all group affiliated foreign nationals by the members electing § 1000.503 plus aggregate direct investment made during the year pursuant to § 1000.507 (a)(1) and (b) in all group affiliated foreign nationals by the members electing § 1000.507.

(3) Unless the election referred to in § 1000.907(c)(2) has been made and approved by the Secretary, each member of an associated group shall file separate reports under § 1000.602 in the manner provided in § 1000.907.

§ 1000.906 Ownership of direct investors.

(a) (1) Unless the election provided for in paragraph (b)(1) of this section is made, no direct investment made or foreign balances held before or after the effective date by a direct investor shall be deemed to have been made or held by any other person within the United States because such other person owns or acquires a direct or indirect interest in such direct investor.

(2) A person within the United States which owns a direct or indirect interest in a direct investor may, depending on all the facts and circumstances of the particular case, be deemed to be acting for or on behalf of the direct investor if such person transfers funds or other property to affiliated foreign nationals of the direct investor.

(b) (1) Persons within the United States owning a direct interest in a direct investor may elect not to be governed by the rule set forth in paragraph (a)(1) of this section: *Provided,* That this election shall not, unless the Secretary in his sole discretion determines otherwise, be available if there are more than 10 persons (whether such persons are persons within the United States or foreign nationals) which own direct interests in such direct investor. For purposes of this paragraph (b), each member of an affiliated group shall be consid-

ered a separate person within the United States.

(2) An election pursuant to subparagraph (1) of this paragraph as to any direct investor shall be made with the consent of those persons within the United States owning, in the aggregate, a majority interest in such direct investor. The election shall be evidenced by a document executed by or on behalf of all persons consenting thereto (hereinafter referred to as the "consenting owners") and such document shall be filed promptly after its execution with the Program Reports Division, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington, D.C. 20230. All persons within the United States owning a direct interest in the direct investor shall be afforded a reasonable opportunity to join in the election and, if any persons within the United States owning a direct interest in the direct investor do not join in the election, the document evidencing the election shall recite that a reasonable opportunity to join in the election was in fact afforded to such persons.

(3) (i) Notwithstanding the provisions of § 1000.305, if an election pursuant to subparagraph (1) of this paragraph is made as to any direct investor (hereinafter referred to in this subparagraph (3) as the "principal direct investor"), each consenting owner shall be deemed a direct investor in every affiliated foreign national of the principal direct investor for all purposes of this part. The entire amount of direct investment made and foreign balances held by the principal direct investor before and after the effective date shall be deemed to have been made or held by the consenting owners. The portion of such foreign balances and direct investment allocable to each such consenting owner shall be a fraction thereof, the numerator of such fraction to be the direct interest in the principal direct investor owned by such consenting owner and the denominator of such fraction to be the aggregate of the direct interests in the principal direct investor owned by all consenting owners.

(ii) Notwithstanding the provisions of § 1000.503, positive direct investment made (or deemed to have been made under subdivision (i) of this subparagraph) during any year, commencing with the year 1970, by consenting owners that elect § 1000.503 in an affiliated foreign national of the principal direct investor shall not be authorized by § 1000.503, unless the aggregate of direct investment made or deemed to have been made during the year by all consenting and nonconsenting owners electing § 1000.503 (such owners being considered for purposes of this subdivision as a single direct investor) in all affiliated foreign nationals of the principal direct investor would have been authorized by § 1000.503.

(iii) Notwithstanding the provisions of § 1000.507, positive direct investment made (or deemed to have been made under subdivision (i) of this subparagraph) during any year, commencing with the year 1970, by consenting owners that elect § 1000.507 in an affiliated foreign national of the principal direct investor shall not be authorized by § 1000.507, unless the aggregate of direct investment made or deemed to have been made during the year by all consenting and nonconsenting owners electing § 1000.507 (such owners being considered for purposes of this subdivision as a single direct investor) in all affiliated foreign nationals of the principal direct investor would have been authorized by § 1000.507.

(iv) If one or more consenting owners elect § 1000.503 and one or more other consenting owners elect § 1000.507, for any year commencing with the year 1971, positive direct investment made (or deemed to have been made under subdivision (i) of this subparagraph) by such consenting owners in affiliated foreign nationals of the principal direct investor shall not be authorized by § 1000.503 or § 1000.507, unless the algebraic sum of the following is not in excess of $2 million: Aggregate direct investment made or deemed to have been made during the year pursuant to § 1000.503 in all affiliated foreign nationals of the principal direct investor by all consenting and nonconsenting owners that elect § 1000.503 plus aggregate direct investment made or deemed to have been made during the year pursuant to § 1000.507 (a) (1) and (b) in all affiliated foreign nationals of the principal direct investor by all consenting and nonconsenting owners that elect § 1000.507.

(4) Once an election is made pursuant to subparagraph (1) of this paragraph, it may not be changed without the permission of the Secretary.

§ 1000.907 Reporting.

(a) Except as provided in paragraph (b)(3) of this section (or unless a specific exemption from reporting is otherwise available) each person within the United States which is a direct investor by virtue of the provisions of §§ 1000.305, 1000.905(b)(1), or 1000.906(b)(3)(i), other than a direct investor as to which an election has been made under § 1000.906(b)(1), shall file separate reports (including Forms FDI-101 and FDI-102) under § 1000.602.

(b)(1) If a direct investor owns direct interests in one or more other direct investors as to which an election has been made under § 1000.906(b)(1) and such direct investor has consented to the election, the reports filed by the direct investor shall include, in addition to all other required information, the direct investor's fractional share (computed in accordance with § 1000.906(b)(3)(i)) of the amount of foreign balances, direct investment and other items which such direct investors would have been required to include in their reports if the elections had not been made.

(2) If a direct investor owns indirect interests in one or more other direct investors, or owns direct interests in one or more other direct investors as to which an election has not been made under § 1000.906(b)(1) or as to which such an election has been made but the direct investor has not consented thereto, reports filed by the direct investor shall not include any foreign balances held or direct investment made by such other direct investors during the relevant period before or after the effective date or any other items required to be included in the reports of such other direct investors for such period.

(3) If, by virtue of the provisions of paragraph (b)(2) of this section, a direct investor has no foreign balances or direct investment transactions which are reportable by it for any period before or after the effective date, the direct investor shall not be required to file a Form FDI-101 or FDI-102 for such period.

(c) (1) If a direct investor is a member of one or more associated groups, the reports filed by the direct investor shall include, in addition to all other required information, the net transfers of capital made by the direct investor to all group affiliated foreign nationals during the relevant period, and, if any of the group affiliated foreign nationals are incorporated affiliated foreign nationals as defined in § 1000.304, shall also include the direct investor's proportionate share in the reinvested earnings of such incorporated affiliated foreign nationals during such period. A member of an associated group which is a direct investor under § 1000.905(b)(1) but not under § 1000.305 is not subject to the provisions of § 1000.203, and such member shall not report its foreign balances on Forms FDI-101 or FDI-102.

(2) Notwithstanding the foregoing, the members of an associated group may elect, by a document executed by or on behalf of a majority in interest of the members of the group and filed with the Program Reports Division, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington, D.C. 20230, to have one member of the group file reports under § 1000.602 on behalf of all members, each such report to reflect the aggregate direct investment transactions of all members with all group affiliated foreign nationals during the relevant period before or after the effective date. Such election shall be subject to the approval of the Secretary who may grant such approval subject to any terms and conditions that he deems necessary. Once an election is made pursuant to this subparagraph (2), it may not be changed without the permission of the Secretary.

(d) If a direct investor is an affiliated or family group, the reports filed by the direct investor shall aggregate all foreign balances, direct investment transactions and other reportable items attributable to each member of the group. The group's Forms FDI-101 and FDI-102 shall be filed on behalf of the group by one member thereof. Such member shall also file all other reports, certificates and other documents required to be filed by the group under the provisions of this part.

Subpart J—Repayment of Borrowings

§ 1000.1001 Definitions.

For purposes of this part and General Authorization No. 1 (33 F.R. 818):

(a) The term "borrowing by an affiliated foreign national" means a borrowing by an affiliated foreign national of a direct investor from any person (other than the direct investor or another affiliated foreign national of the direct investor), including, but not by way of limitation, an extension of credit by any such person to the affiliated foreign na-

tional in connection with the purchase of property (including securities) by the affiliated foreign national from such person. Repayment by a direct investor of a borrowing by an affiliated foreign national includes repayment of all interest, premiums and other fees and charges, if any, owing to the lender in connection therewith.

(b) The term "borrowing by a direct investor" means a borrowing by the direct investor, repayment of which by the direct investor would constitute a transfer of capital under § 1000.312(a)(7).

(c) The term "guarantee," when used with respect to a borrowing by an affiliated foreign national, includes (1) a written acknowledgement of secondary responsibility (whether or not legally enforceable) to a bank with respect to the borrowing or with respect to the financial condition of the affiliated foreign national; (2) a written guarantee, endorsement, surety agreement, application for letter of credit or standby agreement with respect to the borrowing; (3) a contingent contractual commitment with respect to the borrowing of the type involved in so-called through put agreements, take or pay contracts, keep well agreements, and other similar written agreements; and (4) a mortgage, pledge or hypothecation of property as security for repayment of the borrowing, other than a mortgage, pledge or hypothecation to or with a foreign national which constitutes a transfer of capital under § 1000.312(a)(9). The term "guarantee" includes a guarantee given by one affiliated foreign national of a direct investor with respect to a borrowing by another affiliated foreign national of the direct investor if repayment pursuant to the guarantee would result in a transfer of capital by the direct investor under § 1000.505.

(d) The term "bank" means a domestic bank or a foreign bank as described in § 1000.317.

§ 1000.1002 Transfers of capital in connection with repayment of borrowings.

(a) Subject to the provisions of § 1000.1003, positive direct investment by a direct investor during any year in affiliated foreign nationals in any Scheduled Area is authorized, notwithstanding the provisions of § 1000.201, to the extent such positive direct investment is attributable in whole or in part to those transfers of capital by the direct investor (including transfers of capital under § 1000.505) as are described in subparagraphs (1) through (6) of this paragraph (a):

(1) A transfer of capital, pursuant to a guarantee made prior to June 10, 1968, which transfer is made in repayment of, or to enable an affiliated foreign national to repay, a borrowing by such affiliated foreign national: *Provided,* That, in the case of a guarantee made on or after January 1, 1968, the direct investor shall have complied with the certification requirements set forth in section 2(a)(1) of General Authorization No. 1.

(2) A transfer of capital in repayment of, or to enable an affiliated foreign national to repay, a borrowing by such affiliated foreign national from a bank made prior to January 1, 1968, or a borrowing by such affiliated foreign national from a bank made on or after January 1, 1968, pursuant to a fixed loan commitment or line of credit established prior to such date or pursuant to any renewal or extension of such a fixed loan commitment or line of credit: *Provided,* That the liquid assets of the affiliated foreign national are not sufficient to repay such borrowing and that the affiliated foreign national has made every reasonable effort to refinance the borrowing on terms generally available to companies of similar size and financial position; *And provided further,* That, if, on or after January 1, 1968, the amount of such a fixed loan commitment or line of credit is increased by 10 percent or more, a new fixed loan commitment or line of credit shall be deemed to have been established at the time of such increase in an amount equal to the amount of the increase.

(3) A transfer of capital consisting of the delivery of equity securities of the direct investor, pursuant to the exercise of conversion or similar rights, to holders of debt obligations issued by the direct investor or by an affiliated foreign national of the direct investor, without regard to the date the borrowing is made: *Provided,* That, for purposes of § 1000.1003, any such transfer of capital shall be deemed to have been made in the year immediately following the year in which the conversion or similar rights are exercised.

(4) A transfer of capital (other than a transfer referred to in subparagraph (3) of this paragraph) in repayment of a borrowing by the direct investor made prior to June 10, 1968: *Provided,* That with respect to a borrowing made on or after January 1, 1968, the direct investor shall have complied with the certification requirements set forth in section 2(b) of General Authorization No. 1.

(5) A transfer of capital, pursuant to a guarantee made on or after June 10, 1968, which transfer is made in repayment of, or to enable an affiliated foreign national to repay, a borrowing by such affiliated foreign national: *Provided,* That the direct investor shall have complied with the certification requirements set forth in paragraph (b) of this section.

(6) A transfer of capital (other than a transfer referred to in subparagraph (3) of this paragraph) in repayment of a borrowing by the direct investor made on or after June 10, 1968: *Provided,* That the direct investor shall have complied with the certification requirements set forth in paragraph (b) of this section.

(b) The certificate required by subparagraphs (5) and (6) of paragraph (a) of this section shall (after June 9, 1969) be made on Form FDI–106, and shall, except as otherwise provided in paragraph (e)(3) of this section, be delivered to the Secretary not later than 10 days after the date of the borrowing by the direct investor or the date of the guarantee of the borrowing by the affiliated foreign national, as the case may be. It shall be executed by the direct investor or a duly authorized representative of the direct investor, shall state the amount of the borrowing, and the amount of the required principal repayment, shall identify the lender (or the managing underwriter, if the borrowing involves a public offering), and shall certify as follows:

(1) If the direct investor believes, on the basis of all facts and circumstances existing when the certificate is delivered to the Secretary, that it will not make any transfers of capital in connection with repayment of the borrowing within 7 years after the date of the borrowing (or the date of the guarantee, if the borrowing is by an affiliated foreign national), the certificate shall state such belief and the reasons therefor.

(2) If the direct investor believes, on the basis of all facts and circumstances existing when the certificate is delivered to the Secretary, that it will make transfers of capital in connection with repayment of the borrowing within the aforesaid 7-year period, but also believes, on the basis of such facts and circumstances, that no positive direct investment by the direct investor in any scheduled area during any year will result in whole or in part from such transfers, or that any positive direct investment in any scheduled area which does result from such transfers will be authorized by this part (otherwise than by this section), the certificate shall state such beliefs and the reasons therefor.

(c) In determining whether a transfer of capital in connection with the repayment of a borrowing will be made within 7 years from the date of the borrowing or the guarantee thereof, as the case may be, and whether any such transfer will result in unauthorized positive direct investment during any year:

(1) A direct investor may disregard the possible occurrence of events (such as defaults by the direct investor or the borrowing affiliated foreign national, as the case may be), which are not reasonably likely to occur in view of the facts and circumstances existing when the certificate is delivered to the Secretary;

(2) A direct investor may disregard potential transfers of capital resulting from conversions into equity securities of the direct investor of the debt obligation as to which the certificate is being given and of other convertible debt obligations issued by the direct investor or affiliated foreign nationals of the direct investor: *Provided,* That potential transfers of capital resulting from conversions of debt obligations issued on or after June 10, 1968, shall not be disregarded if (i) the obligations have an original maturity of less than 7 years or (ii) the obligations are not sold in a public offering and are convertible within 3 years from the date of issuance; and

(3) A direct investor must consider, if a guaranteed borrowing by an affiliated foreign national is involved, whether the borrowing affiliated foreign national is reasonably likely to have sufficient financial resources to repay the borrowing after such affiliated foreign national (and all other affiliated foreign nationals in the same scheduled area) have paid all dividends or remittance which they may be required to pay by virtue of the limitations imposed in this part on positive direct investment.

(d) Notwithstanding the provisions of paragraph (a) of this section, no positive

direct investment resulting from repayment of a borrowing shall be authorized by this subpart if repayment is made at the option of the direct investor. For purposes hereof, a repayment shall be deemed to have been made at the option of a direct investor if it was made pursuant to a call or like provision resting control of the time of repayment in the direct investor or an affiliated foreign national or if, at the time of repayment, the direct investor or an affiliated foreign national had the option to renew, extend or continue the borrowing and such option was not exercised.

(e) For purposes of this part and of General Authorization No. 1:

(1) A borrowing by a direct investor or an affiliated foreign national shall be deemed to have been made on the date the proceeds thereof are received by the borrower or, if an extension of credit in connection with the purchase of property is involved, on the date such property is purchased. Notwithstanding the foregoing, (i) if a borrowing involves a public offering of debt obligations, the borrowing shall be deemed to have been made on the date the obligations are issued and (ii) if a borrowing involves the use of an overdraft facility, the borrowing shall be deemed to have been on the date the overdraft is used.

(2) The refinancing by a direct investor of a foreign borrowing or a long-term foreign borrowing in accordance with the provisions of § 1000.324(b)(1), or the refinancing of a borrowing by an affiliated foreign national (by renewal, extension or continuance of such borrowing or by making a subsequent borrowing from the same or another lender), shall not be deemed a repayment of the original borrowing or the making of a new borrowing.

(3) If funds are to be borrowed by a direct investor or an affiliated foreign national pursuant to an arrangement with a lender (such as a line of credit or revolving credit arrangement) whereby the funds may be taken down from time to time over a specified period up to a stated maximum aggregate amount (or pursuant to a renewal or extension of such an arrangement), the direct investor may, in lieu of filing a separate certificate as to each take-down which constitutes a borrowing, file a single certificate with respect to all such borrowings, such certificate to be filed on or prior to the date of the first borrowing under the arrangement or under the renewal or extension thereof, as the case may be.

§ 1000.1003 Effect of transfers of capital in repayment of borrowings.

(a) For the purposes of this § 1000.1003, the term "repayment charge" shall mean an amount equivalent to the amount of positive direct investment made by a direct investor pursuant to § 1000.1002. A repayment charge shall be incurred by a direct investor in any year in which positive direct investment is made pursuant to § 1000.1002.

(b) The amount of positive direct investment authorized to be made by a direct investor under Subparts E and M of this part shall be reduced as provided in paragraphs (c) and (d) of this section until reductions equal in the aggregate to the repayment charge shall have been made.

(c) (1) In any year, commencing with the year 1970, in which a repayment charge is incurred, the amount of positive direct investment authorized to be made by the direct investor shall be reduced as follows: Except as hereinafter provided, reduction shall be made first in the amount of positive direct investment authorized under Subpart E of this part in the scheduled area in which the positive direct investment under § 1000.1002 was made, and, to the extent that the repayment charge exceeds the amount of positive direct investment so authorized in such scheduled area, further reduction shall be made in the amount of positive direct investment authorized under Subpart E of this part in Schedules C, B, and A, in that order, and then in the amount of positive direct investment authorized under Subpart M of this part: *Provided*, That the amount of the reduction shall not exceed the repayment charge and that such reduction shall not reduce authorized positive direct investment under said subparts in any year to an amount less than zero.

(2) Reductions under subparagraph (1) of this paragraph in the amount of positive direct investment authorized under Subpart E of this part shall be made first in the aggregate amount of positive direct investment authorized under § 1000.503, § 1000.504, or § 1000.507 (except as provided in paragraph (d) of this section), whichever is elected by the direct investor for the year, and then in the amount of positive direct investment authorized under § 1000.506.

(3) Reductions under subparagraph (1) of this paragraph in the amount of positive direct investment authorized in Schedule C pursuant to § 1000.504 shall be made first in the amount of authorized positive direct investment under § 1000.504 (a) and (c) or (b), (d)(3), and (f)(3)(i), and then in the amount of authorized reinvested earnings under § 1000.504 (e) and (f)(3)(ii).

(4) Reductions in the amount of authorized positive direct investment under subparagraph (1) of this paragraph for a repayment charge attributable to transfers of capital primarily related to operations in foreign air transportation by direct investors described in § 1000.1302(a) shall be made first in the amount of authorized positive direct investment under Subpart M of this part.

(5) Reductions under subparagraph (1) of this paragraph in the amount of positive direct investment authorized under § 1000.507(a)(2) shall be made only to the extent that the repayment charge is the result of:

(i) Transfers of capital described in § 1000.1002(a) (1), (2), (3), or (5): *Provided*, That the borrowings referred to in § 1000.1002(a) (1), (2), (3), and (5), are borrowings of affiliated foreign nationals located in Schedule A; or

(ii) Transfers of capital described in § 1000.1002(a) (3), (4), or (6), to the extent that the proceeds of the borrowings referred to in § 1000.1002(a) (3), (4), and (6) were expended in or allocated to Schedule A, at the time of repayment, and for which a deduction was made under § 1000.203(d)(2), § 1000.203(d)(3), § 1000.306(e), or § 1000.313(d)(1).

(d) If the repayment charge incurred in any year exceeds the amount of authorized positive direct investment reduced under this section, reductions shall be made in each succeeding year in the same manner and order as set forth in paragraph (c) of this section. A direct investor electing for any year to be governed by § 1000.507 may elect, by so indicating on its Annual Report Form FDI–102F for such year, that the amount of positive direct investment that it is authorized to make in Schedule A under § 1000.507(a)(2) shall not be reduced pursuant to this paragraph (d): *Provided*, That a direct investor may not so elect with respect to a repayment charge incurred during the year 1968 under § 1000.1003 as in effect for 1968.

General Authorization No. 1—Transfers of Capital. (REVOKED, superseded by Subpart-J, Repayment of Borrowings).

Subpart K—Direct Investment in Canada

§ 1000.1101 Definitions.

(a) The term "Canadian affiliate" of a direct investor means an affiliated foreign national of the direct investor in Canada.

(b) The term "Non-Canadian Scheduled B affiliate" of a direct investor means an affiliated foreign national of the direct investor in a Schedule B country other than Canada.

(c) The term "Canadian bank" includes any branch or office within Canada of any of the following: Any bank or trust company organized under the banking laws of Canada or any province thereof, or any private bank or banker subject to supervision and examination under the banking laws of Canada or any province thereof.

(d) The term "Canadian person" means an individual who is a resident of Canada, a Canadian bank, and a Corporation or other entity (other than a bank) organized under the laws of Canada or any political subdivision thereof.

§ 1000.1102 Authorized positive direct investment in Canada.

Positive direct investment by a direct investor during any year in Canadian affiliates of the direct investor is authorized, without limitation as to amount.

§ 1000.1103 Net transfers of capital to Schedule B countries.

(a) For purposes of determining the net transfer of capital by a direct investor to all incorporated affiliated foreign nationals of the direct investor in Schedule B countries during any period (including the years 1965 and 1966) under § 1000.313(a), there shall be included only (1) the aggregate of all transfers of capital made during such period by the direct investor to incorporated Non-Canadian Schedule B affiliates of the direct investor less (2) the

aggregate of all transfers of capital made during such period by such incorporated Non-Canadian Schedule B affiliates to the direct investor.

(b) For purposes of determining the net transfer of capital by a direct investor to all unincorporated affiliated foreign nationals of the direct investor in Schedule B countries during any period (including the years 1965 and 1966) under § 1000.313(b), there shall be included only the direct investor's share of the aggregate net assets of unincorporated Non-Canadian Schedule B affiliates of the direct investor.

(c) The provisions of § 1000.505(b) relating to the extension of short-term trade credits from one affiliated foreign national of a direct investor to another affiliated foreign national of the direct investor shall not be applicable if either the affiliated foreign national extending the credit or the affiliated foreign national receiving the credit is a Canadian affiliate.

(d) [Revoked]

§ 1000.1104 Reinvested earnings—Schedule B countries.

(a) For purposes of determining a direct investor's share in the total reinvested earnings of all incorporated affiliated foreign nationals of the direct investor in Schedule B countries during any period (including the years 1965 and 1966) under § 1000.306(a)(2), there shall be included only the direct investor's share in the total reinvested earnings of all incorporated Non-Canadian Schedule B affiliates of the direct investor during such period.

(b) In determining the direct investor's share in the total reinvested earnings of all incorporated Non-Canadian Schedule B affiliates during any period pursuant to § 1000.306(b), all incorporated and unincorporated Canadian affiliates of the direct investor shall be deemed to be in a scheduled area other than Schedule B.

§ 1000.1105 Foreign balances.

(a) The term "Canadian foreign balances" means (1) money on deposit in a Canadian bank (including fixed interest deposits of a Canadian bank); (2) negotiable instruments, nonnegotiable instruments or commercial paper of Canadian persons; and (3) securities issued or guaranteed by the Government of Canada or any political subdivision thereof or by any agency or instrumentality of the Government of Canada or any such political subdivision.

(b) For purposes of § 1000.203(c), the average end-of-month amounts of liquid foreign balances (other than direct investment liquid foreign balances) held by a direct investor during 1965 and 1966 and as of the end of any month commencing June 1968 shall be calculated by excluding all such liquid foreign balances then held by the direct investor which constitute Canadian foreign balances.

(c) [Revoked]

§ 1000.1106 Long-term foreign borrowing.

For all purposes of this part, a borrowing by a direct investor from a Canadian person, whether before or after the effective date, shall not be deemed a "long-term foreign borrowing": *Provided,* That, a borrowing involving the public offering, prior to April 1, 1968, of instruments of indebtedness of a direct investor, shall be considered a long-term foreign borrowing in its entirety if less than 25 percent of the aggregate principal amount of such instruments was sold to Canadian persons, or, if 25 percent or more of the aggregate principal amount of such instruments was sold to Canadian persons, the borrowing shall be considered a long-term foreign borrowing to the extent of the aggregate principal amount which the direct investor proves, to the satisfaction of the Secretary, to have been sold to persons other than Canadian persons: *And provided further,* That, a borrowing involving the public offering, on or after April 1, 1968, of instruments of indebtedness of a direct investor, shall be considered a long-term foreign borrowing in its entirety if such instruments are sold through underwriters in accordance with agreements limiting such sales to persons other than Canadian persons (other than sales to underwriters or securities dealers who are Canadian persons but who agree that they are purchasing such instruments as principals for resale to persons who are not Canadian persons and sales to agents or fiduciaries who are Canadian persons but who are acting for the benefit of persons who are not Canadian persons).

§ 1000.1107 Canadian program.

If a program for governing transfers of capital to foreign countries or the nationals thereof by Canadian affiliates and other Canadian business ventures shall hereafter be instituted by the Canadian Government or by any department or agency thereof (which program is consistent with the purposes of the regulations), the regulations will be amended appropriately with respect to transfers of capital to or from Canadian affiliates of a direct investor certified as subject to or participating in such program by the Canadian Government or such department or agency.

Subpart L—Exploration and Development Expenditures

(Proposed but withdrawn prior to to adoption; see Federal Register, Vol. 34, No. 122—Thursday, June 26, 1969)

Subpart M—Affiliated Foreign Nationals of Air Carriers Engaged in Foreign Air Transportation

§ 1000.1301 Exclusions.

(a) For purposes of determining transfers of capital to incorporated or unincorporated affiliated foreign nationals, for any period (including the years 1965 and 1966), a direct investor who is an "air carrier" or "supplemental air carrier", engaged in "foreign air transportation" as those terms are defined in the Federal Aviation Act of 1958 as amended, 49 U.S.C. § 1301 (3), (21), and (32), may elect to exclude from such transfers (i) flight equipment expendable parts described in Civil Aeronautics Board asset account number ("CAB No.") 1310, (ii) aircraft engines described in CAB No. 1602, and (iii) flight equipment rotable parts and assemblies described in CAB No. 1608; *Provided,* That if such assets are so excluded, the direct investor shall also exclude, in calculating the amount of such transfers, reserves for depreciation or obsolescence or like reserves associated with such assets, and shall exclude all charges to depreciation expense or any other charges against earnings associated with such assets; *And provided further,* That such assets are reasonably necessary to the direct investor's operations in foreign air transportation.

(b) The election provided under this section shall be made as to any compliance year commencing with 1968 by stating that a § 1000.1301 election is made on the cover page of the last quarterly report for such year on Form FDI–102 timely filed by the direct investor pursuant to § 1000.602(b)(2) and by filing with said Form FDI–102, if not previously filed, an appropriately revised base period report on Form FDI–101. An election made pursuant to this section shall be binding and effective as to all assets meeting the requirements of paragraph (a) of this section and shall be binding and effective as to the year for which the election is made and for all succeeding years. Such an election may not thereafter be changed without the consent of the Secretary.

§ 1000.1302 Foreign air transport allowable.

(a) Positive direct investment by a direct investor who is an "air carrier" or "supplemental air carrier" engaged in "foreign air transportation" as those terms are defined in the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 (3), (21), and (32), and who elects under § 1000.502(a) (2) or (3), is authorized during any year commencing with the year 1971 in an amount not to exceed 40 percent of aggregate annual foreign air transport earnings for the immediately preceding year: *Provided,* That such positive direct investment is primarily related to the direct investor's operations in foreign air transportation.

(b) "Aggregate annual foreign air transport earnings" for any year shall mean operating profit from international and territorial route operations as properly reported by the direct investor for such year for Civil Aeronautics Board (CAB) income statement account number 7999 minus (1) annual net interest expense (including amortization of debt discount less capitalized interest) or amortization charges related to investment in international and territorial route operations as properly reported on and included in CAB Schedule P–3 or comparable nondivisional report; (2) taxes assessed by foreign countries and primarily related to the direct investor's operations in foreign air transportation; and (3) Federal subsidy as properly reported in CAB account number 4100.

(c) (1) If, during any year commencing with the year 1969, the amount of

positive direct investment authorized under § 1000.504 to a direct investor governed by this section exceeds the amount of direct investment (whether positive or negative) not primarily related to the direct investor's operations in foreign air transportation made by the direct investor during such year under § 1000.504, the direct investor is authorized to make additional positive direct investment as provided in paragraph (a) of this section during such year or succeeding years: *Provided*, That the aggregate amount of additional positive direct investment authorized by this subparagraph shall not be more than the amount of such excess, and that the amount of positive direct investment authorized to the direct investor under § 1000.504 shall be reduced by the amount of additional positive direct investment made under this subparagraph.

(2) If, during any year commencing with the year 1969, the amount of positive direct investment authorized to a direct investor under paragraph (a) of this section exceeds the amount of direct investment (whether positive or negative) made by the direct investor during such year under paragraph (a) of this section, the direct investor is authorized to make additional positive direct investment as provided in paragraph (a) of this section during succeeding years in an aggregate amount of not more than the amount of such excess.

(d) A direct investor governed by this section shall recalculate the amount of positive direct investment authorized to be made in any year commencing with the year 1971 under § 1000.504 (a) and (b) to exclude from the calculation of direct investment during the years 1965 and 1966 under § 1000.504(a), and from the calculation of annual earnings during any year under § 1000.504(b)(4), transfers of capital primarily related to the direct investor's operations in foreign air transportation, aggregate annual foreign air transport earnings and all component accounts and charges associated with such earnings, and all reserves or charges against earnings associated with such transfers.

(e) A direct investor governed by this section shall file on or before June 30, 1969, a revised Base Period Report on Form FDI–101 to exclude any direct investment primarily related to foreign air transportation, and shall thereafter file separate Cumulative Quarterly Reports and Annual Reports on Forms FDI–102 and FDI–102F as provided in § 1000.602(b) (2) and (3) with respect to direct investment governed by this section and with respect to direct investment not so governed.

§ 1000.1303 Adjustment to incremental earnings allowable.

(a) For direct investors governed by § 1000.1302, "aggregate annual earnings" under § 1000.506(a)(1) shall mean the sum of "aggregate annual foreign air transport earnings" as defined in § 1000.1302(b) plus the algebraic sum of such direct investor's annual earnings (as calculated under §§ 1000.504(b)(4) and 1000.1302(d)) during a year in all scheduled areas.

(b) All reference to § 1000.504 in § 1000.506(a)(4) and (c) shall be deemed to include reference to § 1000.1302(a).

Subpart N—Overseas Finance Subsidiaries

§ 1000.1401 Definitions.

(a) "Overseas finance subsidiary" of a direct investor means an affiliated foreign national which:

(1) Is incorporated under the laws of a foreign country other than Canada;

(2) Is directly or indirectly wholly owned (disregarding directors' qualifying shares) by the direct investor;

(3) Has as its principal business making overseas borrowing (as defined in paragraph (b) of this section) and investing overseas proceeds (as defined in paragraph (c) of this section) in (i) debt obligations of the direct investor and (ii) debt obligations of or equity securities in affiliated foreign nationals of the direct investor; and

(4) Has been qualified as an overseas finance subsidiary pursuant to § 1000.1402(a).

(b) "Overseas borrowing" means borrowing by an overseas finance subsidiary which, if made by a direct investor, would qualify as long term foreign borrowing under § 1000.324.

(c) "Overseas proceeds" means the funds or other property received by an overseas finance subsidiary from the first purchaser or holder in exchange for the debt obligation issued or created in connection with an overseas borrowing, less reductions provided for in § 1000.1404.

(d) "Available overseas proceeds" means overseas proceeds held by the overseas finance subsidiary.

(e) "Proceeds borrowing" means a borrowing by a direct investor from its overseas finance subsidiary of overseas proceeds, (1) which borrowing is continuously outstanding for at least 12 months after the date of the borrowing and (2) in exchange for which borrowing the overseas finance subsidiary receives and thereafter holds a debt obligation of the direct investor until such borrowing is repaid or until such debt obligation is canceled.

§ 1000.1402 Qualification.

(a) *Certificate.* An affiliated foreign national may be qualified as an overseas finance subsidiary for any year, commencing with the year 1970, if its direct investor shall have delivered to the Secretary in such year or in any prior year a certificate executed by the direct investor, or its duly authorized representative, which certificate states that:

(1) The affiliated foreign national has been organized as provided in § 1000.1401 (a)(1), is owned as provided in paragraph (a)(2) of that section and is operating so that its principal business is as provided in paragraph (a)(3) of that section; and

(2) The direct investor will take all action necessary to cause such affiliated foreign national at all times to operate in the manner provided in § 1000.1401 (a)(3).

(b) *Records.* A direct investor shall maintain books and records that identify separately each overseas borrowing and proceeds borrowing, the uses to which all overseas proceeds have been put, and all repayments of proceeds borrowing and overseas borrowing.

(c) *Revocation.* Qualification as an overseas finance subsidiary may not thereafter be withdrawn or canceled by the direct investor except as permitted by the Secretary by authorization, exemption or otherwise. The Secretary may revoke the qualification of an affiliated foreign national as an overseas finance subsidiary if he determines, in his discretion, that such affiliated foreign national was not organized as provided in § 1000.1401(a)(1), is not owned as provided in paragraph (a)(2) of that section, is not operating so that its principal business is as provided in paragraph (a)(3) of that section, or has not complied with paragraph (b) of this section.

(d) *Effect on certain specific authorizations.* Any foreign-incorporated finance subsidiary of a direct investor which, pursuant to specific authorization issued under § 1000.801, has been deemed to be a person within the United States or an unaffiliated foreign lender, shall, beginning January 1, 1970, be governed in all respects by the provisions of this subpart in lieu of the provisions and conditions of such specific authorization, except that no certificate need be filed pursuant to paragraph (a) of this section.

§ 1000.1403 Transfers of overseas proceeds; foreign balances.

(a) *Transfers of overseas proceeds.* (1) The transfer of funds or other property in proceeds borrowing shall not be a transfer of capital under § 1000.312(b). For all purposes of this part, the funds or other property received by the direct investor in exchange for the debt obligation issued or created in connection with a proceeds borrowing shall be treated as available proceeds of long-term foreign borrowing (as defined in § 1000.324(d)).

(2) Notwithstanding the provisions of § 1000.505, the transfer of overseas proceeds by an overseas finance subsidiary in the acquisition of an equity interest in or a debt obligation of another affiliated foreign national of the direct investor shall not be included by the direct investor in the calculation of net transfer of capital under § 1000.313.

(3) Notwithstanding the provisions of § 1000.505, the return of overseas proceeds to an overseas finance subsidiary upon the satisfaction, liquidation, sale or other disposition of an equity interest or debt obligation acquired pursuant to subparagraph (2) of this paragraph shall not be included by the direct investor in the calculation of net transfer of capital under § 1000.313.

(b) *Foreign balances.* (1) Foreign balances, as defined in § 1000.203(a)(1), held in liquid form by an overseas finance subsidiary, other than (i) available overseas proceeds and (ii) funds contributed to an overseas finance subsidiary as original or additional equity capital, shall be included in the computation of liquid foreign balances held

by the direct investor for purposes of § 1000.203(c).

(2) [Revoked]

§ 1000.1404 Repayment of overseas borrowing and proceeds borrowing.

(a) For the purposes of this subpart, repayment by a direct investor of overseas borrowing shall mean (i) the complete or partial repayment by the direct investor directly of overseas borrowing and (ii) complete or partial repayment by the direct investor of proceeds borrowing to enable the overseas finance subsidiary to repay overseas borrowing. Notwithstanding the provisions of § 1000.312(a) (6) and (7), a repayment by the direct investor of overseas borrowing or a repayment by the direct investor of proceeds borrowing shall have the effect prescribed by subparagraphs (1) through (6) of this paragraph:

(1) Any repayment by the direct investor of overseas borrowing or proceeds borrowing shall constitute a reduction of available proceeds of long-term foreign borrowing held by the direct investor pursuant to § 1000.1403(a)(1). Overseas proceeds which became available proceeds of long-term foreign borrowing pursuant to such section shall be reduced in the same amount.

(2) The amount of any repayment by the direct investor or overseas borrowing or proceeds borrowing that exceeds the aggregate amount of reduction of available proceeds pursuant to subparagraph (1) of this paragraph shall constitute a transfer of capital to each scheduled area in proportion to and to the extent that the direct investor has expended or allocated to each such scheduled area available proceeds of long-term foreign borrowing and has made a deduction under § 1000.203(d)(2), § 1000.203(d)(3), § 1000.306(e), or § 1000.313(d)(1). Overseas proceeds so expended or allocated shall be reduced in the amount of transfers of capital to scheduled areas prescribed by this subparagraph.

(3) The amount of any repayment by the direct investor of overseas borrowing or proceeds borrowing that exceeds the aggregate amount of reduction of available proceeds pursuant to subparagraph (1) of this paragraph and the aggregate amount of transfers of capital pursuant to subparagraph (2) of this paragraph shall constitute a transfer of capital under § 1000.312(a) to each scheduled area in proportion to and to the extent that the overseas finance subsidiary has, as of the time of repayment, transferred overseas proceeds to other affiliated foreign nationals of the direct investor pursuant to § 1000.1403(a)(2). Overseas proceeds held by such affiliated foreign nationals shall be reduced by an amount equal to the transfers of capital prescribed by this subparagraph.

(4) The amount of any repayment by the direct investor of overseas borrowing or proceeds borrowing that exceeds the aggregate amount of (i) the reduction of available proceeds pursuant to subparagraph (1) of this paragraph and (ii) transfers of capital pursuant to subparagraphs (2) and (3) of this paragraph, shall constitute a transfer of capital under § 1000.312(a) to the scheduled area in which the overseas finance subsidiary is incorporated. Overseas proceeds held by the overseas finance subsidiary at the time of the repayment shall be reduced by an amount equal to the transfer of capital prescribed by this subparagraph.

(5) For purposes of subparagraphs (2), (3), and (4) of this paragraph, transfers of capital resulting from the delivery of equity securities of a direct investor to holders of debt instruments issued by the overseas finance subsidiary in connection with an overseas borrowing, pursuant to the exercise of conversion or similar rights, shall be deemed to have been made in the year immediately following the year in which the conversion or similar rights are exercised.

(6) The aggregate amount of transfers of capital and reduction of available proceeds of long term foreign borrowing pursuant to subparagraphs (1) through (4) of this paragraph and paragraph (b) of this section shall not exceed the amount of overseas proceeds (calculated without regard to the provisions of subparagraphs (1) through (4) of this paragraph): *Provided,* That any transfer of funds or other property, in partial or complete repayment by the direct investor of proceeds borrowing, which repayment is made after complete repayment of the overseas borrowing, shall be a transfer of capital to the scheduled area in which such overseas finance subsidiary is incorporated.

(b) For purposes of this subpart, repayment by the overseas finance subsidiary of overseas borrowing shall mean the complete or partial repayment of overseas borrowing other than with funds or other property supplied to the overseas finance subsidiary by the direct investor to enable the overseas finance subsidiary to repay overseas borrowing. A repayment by the overseas finance subsidiary of overseas borrowing shall have the effect prescribed by subparagraphs (1) and (2) of this paragraph:

(1) The complete or partial repayment by an overseas finance subsidiary of overseas borrowing shall reduce available overseas proceeds, but not to an amount less than zero. Overseas proceeds held by the overseas finance subsidiary shall be reduced by an amount equal to the reduction of available overseas proceeds prescribed by this subparagraph.

(2) The amount of any repayment by an overseas finance subsidiary of overseas borrowing that exceeds the reduction of available overseas proceeds pursuant to subparagraph (1) of this paragraph shall be treated as a repayment by the direct investor of overseas borrowing with the effects prescribed by paragraph (a) of this section.

(c) Notwithstanding the provisions of § 1000.505, the complete or partial repayment by an affiliated foreign national (other than an overseas finance subsidiary) of overseas borrowing shall be treated as a repayment by the direct investor of overseas borrowing, with the effects prescribed by paragraph (a) of this section: *Provided,* That such repayment shall also be treated as a transfer from such affiliated foreign national to the direct investor in the amout of such repayment.

§ 1000.1405 Authorized repayments.

(a) Overseas borrowing shall be deemed to be a borrowing by an affiliated foreign national within the meaning of § 1000.1001(a). A borrowing by an overseas finance subsidiary other than an overseas borrowing shall not be deemed to be a borrowing by an affiliated foreign national for any purposes of this part.

(b) Subject to the provisions of § 1000.1003, positive direct investment during any year in affiliated foreign nationals in any scheduled area is authorized, notwithstanding the provisions of § 1000.201, to the extent such positive direct investment is attributable to a transfer of capital in repayment of overseas borrowing pursuant to a guarantee: *Provided,* That the direct investor shall have complied with the certification requirements set forth in § 1000.1002(b).

(c) For the purposes of § 1000.1002 (b) and (c), the term "transfer of capital" shall include a transfer of capital attributable to a repayment of overseas borrowing pursuant to § 1000.1404(a).

(d) All reference to Subpart J in § 1000.1002(d) and all reference to § 1000.1002 in § 1000.1003 shall be deemed to include reference to paragraph (b) of this section.

§ 1000.1406 Substitution of borrowing.

(a) To the extent that a foreign borrowing (as defined in § 1000.324(a)(1)) is substituted for a proceeds borrowing, as defined in § 1000.1401(e), or for other borrowing by a direct investor from its overseas finance subsidiary that would qualify as a proceeds borrowing under § 1000.1401(e) if such borrowing and the underlying borrowing by the overseas finance subsidiary were continuously outstanding for at least 12 months, such foreign borrowing shall, for the purposes of this part, be treated as a continuance of such proceeds borrowing or other borrowing by the direct investor from its overseas finance subsidiary: *Provided,* That repayment of such foreign borrowing shall reduce proceeds of long-term foreign borrowing or involve a transfer of capital, or both, as prescribed under §§ 1000.324(c) and 1000.312(a)(7).

(b) To the extent that a proceeds borrowing, as defined in § 1000.1401(e), or other borrowing by a direct investor from its overseas finance subsidiary that would qualify as a proceeds borrowing under § 1000.1401(e) if such borrowing and the underlying borrowing by the overseas finance subsidiary were continuously outstanding for at least 12 months, is substituted for a foreign borrowing (as defined in § 1000.324(a)(1)), such proceeds borrowing or other borrowing by the direct investor from its overseas finance subsidiary shall, for the purposes of this part, be treated as a continuance of such foreign borrowing: *Provided,* That repayment of such borrowing from the overseas finance subsidiary or underlying foreign borrowing shall have the effect prescribed under § 1000.1404.

(c) A substitution under paragraph (a) or (b) of this section shall be made on the books and records maintained by the direct investor under §§ 1000.203(b), 1000.601, and 1000.1402(b).

§ 1000.1407 Assumption of debt obligation incurred by overseas finance subsidiary.

(a) To the extent that a direct investor, pursuant to an election under section 4912(c) of the Internal Revenue Code of 1954, as amended, assumes the obligation to repay overseas borrowing incurred by an overseas finance subsidiary, such assumption is foreign borrowing as defined in § 1000.324(a)(1) and also shall have the effect prescribed by subparagraphs (1) through (5) of this paragraph:

(1) To the extent of available overseas proceeds of such overseas borrowing held by the overseas finance subsidiary at the time of assumption, such assumption shall constitute a transfer of capital by the direct investor to the overseas finance subsidiary.

(2) The amount of such assumption that exceeds the amount of the transfer of capital pursuant to subparagraph (1) of this paragraph shall constitute a transfer of capital by the direct investor to each scheduled area in proportion to and to the extent of the amount of overseas proceeds of such overseas borrowing that have been transferred by the overseas finance subsidiary to other affiliated foreign nationals in such scheduled area pursuant to § 1000.1403(a)(2) and are held by such affiliated foreign nationals at the time of assumption.

(3) The amount of such assumption that exceeds the aggregate amount of transfers of capital pursuant to subparagraphs (1) and (2) of this paragraph shall constitute foreign borrowing substituted for proceeds borrowing pursuant to § 1000.1406(a) to the extent that overseas proceeds of such overseas borrowing have been transferred by the overseas finance subsidiary to the direct investor in a proceeds borrowing, as defined in § 1000.1401(e), that is outstanding at the time of assumption.

(4) The amount of such assumption that exceeds the aggregate amount of transfers of capital pursuant to subparagraphs (1) and (2) and substituted foreign borrowing pursuant to subparagraph (3) of this paragraph shall constitute foreign borrowing made by the direct investor on the date of the assumption.

(5) Overseas proceeds of such overseas borrowing shall be reduced by the amount of such assumption or the amount of such proceeds, whichever is less.

(b) To the extent that a direct investor, pursuant to an election under section 4912(c) of the Internal Revenue Code of 1954, as amended, assumes the obligation to repay borrowing incurred by an overseas finance subsidiary that would qualify as overseas borrowing if it were continuously outstanding for at least 12 months but at the time of such assumption has not so qualified, such assumption is foreign borrowing as defined in § 1000.324(a)(1) and also shall have the effect prescribed by subparagraphs (1) through (4) of this paragraph:

(1) To the extent that proceeds of such borrowing by the overseas finance subsidiary are held by the overseas finance subsidiary at the time of assumption, such assumption shall constitute a transfer of capital by the direct investor to the overseas finance subsidiary.

(2) The amount of such assumption that exceeds the amount of the transfer of capital pursuant to subparagraph (1) of this paragraph shall constitute a transfer of capital by the direct investor to each scheduled area in proportion to and to the extent of the amount of proceeds of such borrowing by the overseas finance subsidiary that have been transferred by the overseas finance subsidiary to other affiliated foreign nationals in such scheduled area pursuant to § 1000.1403(a)(2) and are held by such affiliated foreign nationals at the time of assumption.

(3) The amount of such assumption that exceeds the aggregate amount of transfers of capital pursuant to subparagraphs (1) and (2) of this paragraph shall constitute foreign borrowing substituted for borrowing by a direct investor from its overseas finance subsidiary pursuant to § 1000.1406(a) to the extent that proceeds of such borrowing by the overseas finance subsidiary have been transferred by the overseas finance subsidiary to the direct investor in a borrowing that is outstanding at the time of assumption and would qualify as proceeds borrowing under § 1000.1401(e) if such borrowing and the underlying borrowing by the overseas finance subsidiary were continuously outstanding for at least 12 months.

(4) The amount of such assumption that exceeds the aggregate amount of transfers of capital pursuant to subparagraphs (1) and (2) and substituted foreign borrowing pursuant to subparagraph (3) of this paragraph shall constitute foreign borrowing made by the direct investor on the date of assumption.

(c) An assumption under paragraph (a) or (b) of this section shall be reported on the books and records maintained by the direct investor under §§ 1000.203(b), 1000.601 and 1000.1402(b).

GENERAL AUTHORIZATIONS

1 Transfers of capital. (REVOKED, superseded by Subpart-J, Repayment of Borrowings).
2 Limited authorization to refrain from repatriation. (REVOKED)
3 Authorized transfers of capital. (REVOKED)
4 Canada—Application of foreign direct investment regulations. (Proposed but withdrawn prior to adoption; superseded by Subpart-K, Direct Investment in Canada).

GENERAL INTERPRETATIVE RULES

1 §1000.312—Transfer of capital. (REVOKED)
2 General Authorization 1(2)(b)—Certificate. (REVOKED)
3 §1000.312—Transfer of capital. (REVOKED)

IDENTITY OF COUNTRIES IN SCHEDULES A, B, AND C

For the information of the public, there follow the names of the countries allocated to Schedule A, Schedule B, and Schedule C pursuant to § 1000.319 of the Foreign Direct Investment Regulations. Determination of the schedule of any country, territory, department, province or possession under § 1000.319 depends upon its classification as to less developed country status under § 4916(c) of the Internal Revenue Code, and applicable Executive orders thereunder, administered by the Department of the Treasury. Since no official enumeration of less developed countries has been promulgated pursuant to § 4916(c), the lists below cannot be either definitive or exhaustive.

I. *Schedule A Countries.*

Peoples Democratic Republic of Yemen (formerly Aden).
Afghanistan.
Algeria.
Angola.
Argentina.
Ascension.
Bangladesh.
Barbados.
Bhutan.
Bolivia.
Botswana.
Brazil.
British Honduras.
British West Indies (Leeward and Windward Is.).
Brunei.
Burma.
Burundi.
Cambodia.
Cameroon.
Canton & Enderbury Islands.
Cape Verde Island.
Central African Republic.
Ceylon.
Chad.

Chile.
China, Republic of.
Colombia.
Comoro Island Archipelago.
Congo (Brazzaville).
Costa Rica.
Cyprus.
Dahomey.
Dominican Republic.
Ecuador.
El Salvador.
Equatorial Guinea.
Ethiopia.
Falkland Islands.
Fiji.
Finland.
French Antilles (Guadeloupe, Martinique, French Guiana).
French Polynesia.
French Somaliland.
Gabon.
Gambia.
Ghana.
Gibraltar.
Gilbert and Ellice Islands.
Gough Island.
Greece.
Greenland.
Guatemala.
Guinea.
Guyana.
Haiti.
Honduras.
Iceland.
Ifni.
India.
Indonesia.
Israel.
Ivory Coast.
Jamaica.
Jordan.
Kenya.
Korea, Republic of.
Laos.
Lebanon.
Lesotho.
Liberia.
Macao.
Malagasy Republic.
Malawi.
Malaysia.
Maldive Islands.
Mali.
Malta.
Mauritania.
Mauritius.
Mexico.
Morocco.
Mozambique.
Nauru.
Nepal.
Netherlands Antilles.
New Caledonia.
New Guinea, Territory of.
New Hebrides.
Nicaragua.
Niger.
Nigeria.
Oman.
Pakistan.
Panama.
Paraguay.
Peru.
Philippines.
Pitcairn Island.
Portuguese Guinea.
Reunion.
Rwanda.
Ryukyu Islands, including Okinawa, (prior to May 15, 1972).
St. Helena.
St. Pierre and Miquelon.
Sao Tome & Principe.
Senegal.
Seychelles.
Sierra Leone.
Singapore.
Solomon Islands.
Somali Republic.
Southern Rhodesia.(*)
Spanish North Africa.
Spanish Sahara.
Sudan.
Surinam.
Swaziland.
Syria.
Tanzania.
Thailand.
Timor (Portuguese).
Togo.
Tonga.
Trinidad and Tobago.
Tristan da Cunha.
Tunisia.
Turkey.
Uganda.
United Arab Emirates (excluding Abu Dhabi).
United Arab Republic.
Upper Volta.
Uruguay.
Venezuela.
Vietnam, Republic of.
Western Samoa.
Yemen.
Yugoslavia.
Zaire.
Zambia.

(*) Information concerning restrictions on business activities in Southern Rhodesia may be obtained from the Office of Foreign Assets Control of the Department of the Treasury.

II. *Schedule B Countries.*

Abu Dhabi.
Australia.
Bahamas.
Bahrain.
Bermuda.
Canada.
Hong Kong.
Iran.
Iraq.
Iraq-Saudi Arabia Neutral Zone.
Ireland.
Japan (including Ryuku Islands, commencing May 15, 1972).
Kuwait.
Kuwait-Saudi Arabia Neutral Zone.
Libya.
New Zealand.
Qatar.
Saudia Arabia.
Spain (effective January 1, 1970).
United Kingdom.

III. *Schedule C Countries.*

Andorra.
Austria.
Belgium.
Denmark.
France.
Germany (Federal Republic).
Italy.
Liechtenstein.
Luxembourg.
Monaco.
Netherlands.
Norway.
Portugal.
San Marino.
South Africa.
South-West Africa.
Spain (prior to January 1, 1970).
Sweden.
Switzerland.

Also the following areas which are subject to Treasury and/or Commerce Department economic controls. Albania, Bulgaria, any part of China which is dominated or controlled by International Communism, Cuba, Czechoslovakia, Estonia, Hungary, any part of Korea which is dominated or controlled by International Communism, Latvia, Lithuania, Outer Mongolia, Poland (including any area under its provisional administration), Romania, Soviet Zone of Germany and the Soviet Sector of Berlin, Tibet, the Union of Soviet Socialist Republics and the Kurile Islands Southern Sakhalin, the areas in East Prussia which are under the provisional administration of the Union of Soviet Socialist Republics, and any part of Vietnam which is dominated or controlled by International Communism.

IV. *Areas not subject to the regulations.*

American Samoa.
Guam.
Puerto Rico.
Trust Territory of the Pacific Islands (Caroline Islands, Mariana Islands, and Marshall Islands).
Virgin Islands.
Wake Island.
Canal Zone.

Executive Order 11387

GOVERNING CERTAIN CAPITAL TRANSFERS ABROAD

By virtue of the authority vested in the President by section 5(b) of the act of October 6, 1917, as amended (12 U.S.C. 95a), and in view of the continued existence of the national emergency declared by Proclamation No. 2914 of December 16, 1950, and the importance of strengthening the balance of payments position of the United States during this national emergency, it is hereby ordered:

1. (a) Any person subject to the jurisdiction of the United States who, alone or together with one or more affiliated persons, owns or acquires as much as a 10% interest in the voting securities, capital or earnings of a foreign business venture is prohibited on or after the effective date of this Order, except as expressly authorized by the Secretary of Commerce, from engaging in any transaction involving a direct or indirect transfer of capital to or within any foreign country or to any national thereof outside the United States.

(b) The Secretary of Commerce is authorized to require, as he determines to be necessary or appropriate to strengthen the balance of payments position of the United States, that any person subject to the jurisdiction of the United States who, alone or together with one or more affiliated persons, owns or acquires as much as a 10% interest in the voting securities, capital or earnings of one or more foreign business ventures shall cause to be repatriated to the United States such part as the Secretary of Commerce may specify of (1) the earnings of such foreign business ventures which are attributable to such person's investments therein and (2) bank deposits and other short term financial assets which are held in foreign countries by or for the account of such person. Any person subject to the jurisdiction of the United States is required on or after the effective date of this Order, to comply with any such requirement of the Secretary of Commerce.

(c) The Secretary of Commerce shall exempt from the provisions of this section 1, to the extent delineated by the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board), banks or financial institutions certified by the Board as being subject to the Federal Reserve Foreign Credit Restraint Programs, or to any program instituted by the Board under section 2 of this Order.

2. The Board is authorized in the event that it determines such action to be necessary or desirable to strengthen the balance of payments position of the United States:

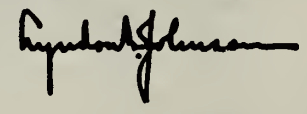
(a) to investigate, regulate or prohibit any transaction by any bank or other financial institution subject to the jurisdiction of the United States involving a direct or indirect transfer of capital to or within any foreign country or to any national thereof outside the United States; and

(b) to require that any bank or financial institution subject to the jurisdiction of the United States shall cause to be repatriated to the United States such part as the Board may specify of the bank deposits and other short term financial assets which are held in foreign countries by or for the account of such bank or financial institution. Any bank or financial institution subject to the jurisdiction of the United States shall comply with any such requirement of the Board on and after its effective date.

3. The Secretary of Commerce and the Board are respectively authorized, under authority delegated to each of them under this Order or otherwise available to them, to carry out the provisions of this Order, and to prescribe such definitions for any terms used herein, to issue such rules and regulations, orders, rulings, licenses and instructions, and to take such other actions, as each of them determines to be necessary or appropriate to carry out the purposes of this Order and their respective responsibilities hereunder. The Secretary of Commerce and the Board may each redelegate to any agency, instrumentality or official of the United States any authority under this Order, and may, in administering this Order, utilize the services of any other agencies, Federal or State, which are available and appropriate.

4. The Secretary of State shall advise the Secretary of Commerce and the Board with respect to matters under this Order involving foreign policy. The Secretary of Commerce and the Board shall consult as necessary and appropriate with each other and with the Secretary of the Treasury.

5. The delegations of authority in this Order shall not affect the authority of any agency or official pursuant to any other delegation of presidential authority, presently in effect or hereafter made, under section 5(b) of the act of October 6, 1917, as amended (12 U.S.C. 95a).



THE WHITE HOUSE
10:45 a.m.,
Jan. 1, 1968,
L.B.J. Ranch.

[F.R. Doc. 68-112; Filed, Jan. 1, 1968; 6:05 p.m.]

Title 15—COMMERCE AND FOREIGN TRADE

Chapter X—Office of Foreign Direct Investments, Department of Commerce

FOREIGN DIRECT INVESTMENT RULES OF PRACTICE AND GENERAL PROCEDURES

PART 1020—INVESTIGATIVE PROCEDURES

Sec.

AUTHORITY: The provisions of this Part 1020 issued pursuant to sec. 5 of the Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan. 1, 1968, 33 F.R. 47; Department Organization Order 25-3A (formerly Department Order 184-A), Jan. 1, 1968, 33 F.R. 54.

§ 1020.111 Investigations.

The Office [1] may, in its discretion, initiate investigations relating to compliance by any person [2] with the Foreign Direct Investments Program (hereinafter referred to as the Program) as embodied in E.O. 11387 and Part 1000 of this chapter, any rule, regulation, or order thereunder, term or condition of any authorization or exemption issued thereunder, any decree of court relating thereto, or any other agency action thereunder.

§ 1020.112 Investigative policy.

The Office encourages voluntary cooperation with its investigations. Where the circumstances appear so to require, however, the Office may invoke compulsory process as authorized by law.

§ 1020.113 By whom conducted.

Investigations will be conducted by representatives of the Office duly designated and authorized for the purpose. Such representatives are authorized, among other things, to administer oaths and receive affirmations in any matter under investigation by the Office.

§ 1020.114 Notification of purpose.

Any person under investigation who is compelled or requested to furnish information or documentary evidence shall be advised with respect to the general purpose for which such information or evidence is sought.

§ 1020.121 Orders to furnish information.

(a) The Office may issue orders requiring any person or persons named therein:

(1) To appear before a designated representative at a designated time and place to testify, produce documentary evidence, and/or produce other information relating to any transaction involving foreign direct investment; and/or

(2) To file (whether on a continuing basis, at stated intervals, upon the occurrence of specified acts or omissions, or otherwise) reports or answers in writing to specified questions, relating to any matter that is or has been under investigation or inquiry, or is likely to lead to the production of information relating to any such matter.

(b) Any person required to submit any report, whether under this section or under § 1000.602(b) of this chapter, shall preserve, or cause to be preserved, for at least 3 years after the date of filing of such report all working papers, irrespective of by whom prepared, used in the preparation of such report; all exhibits, all schedules, and all attachments to such papers; and all books and all records related to such report or to such other papers, that were prepared in the ordinary course of business.

§ 1020.122 Authority to initiate investigations and to issue or modify agency process.

The Director of the Compliance Division is hereby delegated, without power of redelegation, the authority to initiate investigations under § 1020.111 and to issue orders under § 1020.121 and, for good cause shown, to limit, quash, modify, or withdraw such orders or to extend the time prescribed therein for compliance.

§ 1020.123 Motions relating to agency process.

Any motion to limit, quash, modify, or withdraw any order issued under § 1020.121 or to extend the time prescribed for compliance must be filed with the Office (to the attention of the person issuing said order) within seven (7) days after service of such order, or, if the return date is less than seven (7) days after service of the order, within such other time prior to the return date as may be designated in such order. Any allegation of undue burden must be accompanied by an affidavit setting forth with particularity the supporting facts.

§ 1020.124 Review; finality.

(a) Upon denial of a motion made under § 1020.123, the moving party may appeal to the decision officer pursuant to the procedure set out in § 1030.514 of this chapter. The determination of the decision officer shall constitute final agency action.

(b) The Director of the Compliance Division may extend the return date specified in an order issued pursuant to § 1020.121 by up to twenty (20) days later than the date of denial of relief under paragraph (a) of this section where:

(1) Such relief is requested by motion under § 1020.123 for the purpose of seeking judicial review of the order without first committing a willful violation thereof, and

(2) The public interest in effective enforcement and administration of the Program will not be compromised thereby.

§ 1020.131 Investigative hearings.

(a) The Office may conduct investigative hearings in the course of any investigation or inquiry relating to the administration or enforcement of the Program, as described in § 1020.111, including inquiries initiated for the purpose of determining whether to institute a proceeding under Part 1030 of this chapter.

(b) Investigative hearings shall be nonadjudicative proceedings, presided over by a representative of the Office (hereinafter referred to as the "presiding official") designated in the order issued pursuant to § 1020.121.

(c) Investigative hearings shall be stenographically recorded unless the presiding official, in his discretion upon the request of a witness, otherwise orders.

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[1] As used in Parts 1020–1050 of this chapter, the "Office" means the Office of Foreign Direct Investments, U.S. Department of Commerce.

[2] As used in Parts 1020–1050 of the chapter, "person" means any individual, corporation, partnership, business venture, trust, or estate.

(d) Unless otherwise ordered by the Director of the Office, investigative hearings shall not be public.

§ 1020.132 Rights of witnesses in investigations.

Any person compelled or requested to submit information to the Office, or to testify in an investigative hearing, shall be entitled to be accompanied, represented, and advised by counsel or another person who has entered an appearance under § 1050.101 of this chapter (referred to hereafter in this section as "counsel") as follows:

(a) Counsel for a witness may advise his client, in confidence, and upon the initiative of either himself or the witness, with respect to any question asked of his client. If it appears that counsel is prompting the witness under color of this paragraph, the presiding official will so note and take appropriate action in respect thereto under paragraph (f) of this section. If, upon advice of counsel, the witness refuses to answer a question, counsel may briefly state that he has advised his client not to answer the question and the legal grounds for such refusal.

(b) Where it is claimed that the testimony or other evidence sought is outside the scope of the investigation, or that the witness is privileged to refuse to to answer a question or to produce other evidence, counsel for the witness may object and briefly and precisely state the grounds therefor.

(c) Cumulative objections are unnecessary. Repetition of the grounds for any objection will not be allowed. At the request of counsel and/or when directed by the presiding official, any objections will be treated as continuing objections and preserved throughout the further course of the hearings as to any related line of inquiry.

(d) Any motion challenging the Office's authority to conduct the investigation or the sufficiency or legality of the order to testify or produce documents or other information must have been addressed to the Office prior to the hearing (see § 1020.123). Additional copies of such motions may be filed with the presiding official as part of the record of the investigation and may be incorporated by reference into counsel's statements or objections, but no arguments in support thereof will be allowed at the hearing.

(e) After the presiding official and/or counsel for the Compliance Division have completed the examination of a witness, counsel for the witness may request the presiding official to permit the witness to clarify any of his answers in order that they may not remain equivocal or incomplete. The granting or denial of such request shall be within the sole discretion of the presiding official, and any grant may be withdrawn if counsel attempts to lead the witness or suggest answers.

(f) The presiding official shall take all necessary and appropriate actions to avoid delay, to prevent or restrain disorderly, dilatory, obstructive, or contumacious conduct and/or otherwise to regulate the course of the hearing.

§ 1020.141 Noncompliance with orders or directions.

(a) In cases of failure to comply fully with any compulsory process, including an order issued under § 1020.121, or refusal to obey a direction by a presiding official to answer a specific question, the Office may initiate or recommend appropriate action. The fact that an order is partially defective, or that a person may so believe, will not excuse compliance with the remainder of the order.

(b) Honest mistakes or isolated oversights, made in a good faith attempt to comply with an order of the Office or the direction of a presiding official, will normally not lead to an enforcement action.

§ 1020.151 Termination of investigations.

When the facts disclosed by an investigation indicate that further action is not necessary or warranted in the public interest, the investigative file will be closed, without prejudice to further investigation by the Office at any time if circumstances so warrant.

PART 1025—SETTLEMENT PROCEDURES

Sec.

AUTHORITY: The provisions of this Part 1025 issued pursuant to Sec. 5 of the Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan. 1, 1968, 33 F.R. 47; Department Organization Order 25-3A (formerly Department Order 184-A), Jan. 1, 1968, 33 F.R. 54.

§ 1025.111 General policy.

When the Office has reason to believe that any person subject to the jurisdiction of the Office (referred to hereinafter in this part as a "party") has violated any requirement of the Program, the Office may initiate enforcement action. Sections 5(b)(3) and 17 (as amended) of the Act of October 6, 1917 (50 U.S.C. App. 5(b)(3) 17), permit either criminal or civil sanctions, and Part 1030 of this chapter provides for formal administrative proceedings. Ordinarily, in the absence of willful violation or flagrant disregard of Program requirements, the Office will utilize one of the settlement procedures described in this part when such resolution is deemed to be in the public interest.

§ 1025.211 Informal, voluntary settlement.

(a) *Policy.* In determining whether to afford a party the opportunity for informal, voluntary settlement, the Office will consider the following:

(1) Whether the party acted in good faith;

(2) Whether the alleged noncompliance was unintentional or unforeseeable and whether the party took steps to avoid the alleged noncompliance;

(3) Whether the party cooperated with the office in ascertaining the facts and did not attempt to conceal or falsify information;

(4) The nature of the alleged noncompliance;

(5) The prior conduct of the party with respect to Program requirements; and

(6) Other relevant factors, including whether the Office believes that the party's assurances of future compliance with the Program will be adequate to ensure such compliance.

(b) *Investigation.* In addition to any investigation the Office may conduct into the substantive nature of the noncompliance, the Office may conduct an independent inquiry regarding any or all of the items enumerated in paragraph (a) of this section.

(c) *Conference policy.* It is the policy of the Office to give any party the opportunity to discuss with the staff, on an informal basis, the possible settlement of any compliance investigation involving such party. Ordinarily, any request for such discussion should be directed, in the first instance, to the staff member responsible for conducting the investigation.

(d) *Form.* (1) Disposition of a matter by an informal settlement will be in the form of an exchange of agreed-upon letters passing between the party and the Office. The letter from the Office will be signed by the Director of the Office.

(2) The letter from the party to the Office will set forth the pertinent circumstances relating to and constituting the alleged noncompliance, the steps taken to undo, correct, and prevent its recurrence and other matters agreed upon by the party and Office. The letter from the Office to the party will state the intention of the Office, based on the representations in the party's letter, to close the matter; however, the Office will expressly reserve the power to reopen the matter should the public interest so require.

§ 1025.311 Consent agreement policy and procedures.

(a) *Preliminary Notice.* If the Office, in its discretion, determines that informal, voluntary settlement is inappropriate, it will, where time, the nature of the matter involved, and the public interest permit, notify the party (i) of its intention to institute a formal proceeding against the party and (ii) that the party will be afforded an opportunity to confer with the Office staff and to submit an appropriate consent agreement proposal for consideration by the Office. Such notice may be in the form specified in § 1030.211 of this chapter or, in the discretion of the Office, in such other form sufficient to apprise the party of the nature of the alleged noncompliance. The party may appear personally or he may be represented by a person who has entered an appearance under § 1050.101 of this chapter.

(b) *Conditions.* The Office will consider each such case individually, on the basis of all relevant facts and circumstances, including any mitigating or extenuating factors. Depending upon the

circumstances of the case, administrative settlement of compliance matters by a consent agreement may entail one or more of the remedies set forth in § 1030.472 of this chapter.

(c) *Form of agreement.* (1) Every consent agreement tendered by a party shall contain an appropriate form of order or judgment to be entered, an admission of all jurisdictional facts, and express waivers of further procedural steps, of any requirement of findings, and of rights to seek any form of judicial or appellate review or otherwise to challenge or contest the content, validity, or finality of the order. In addition, such proposed agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by the party that the law has been violated.

(2) The Office will determine whether the public interest would be better served by an agreement providing for an administrative consent order or a judicial consent judgment. Among the factors that the Office will ordinarily consider in making such determination are: (i) The nature and gravity of the alleged noncompliance, (ii) the prior conduct of the party with respect to Program requirements and (iii) the likelihood that subsequent enforcement proceedings against the party will be necessary.

PART 1030—PROCEDURES AND RULES OF PRACTICE FOR FORMAL ADMINISTRATIVE PROCEEDINGS

Subpart A—General Policies and Procedures; Scope of Rules

Subpart B—Notice; Answer; Other Pleadings

Subpart C—Prehearing Procedures; Motions; Discovery

Subpart D—Hearings

Subpart E—Decision and Review

AUTHORITY: The provisions of this Part 1030 issued pursuant to sec. 5 of the Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan. 1, 1968, 33 F.R. 47; Department Organization Order 25–3A (formerly Department Order 184–A), Jan. 1, 1968, 33 F.R. 54.

Subpart A—General Policies and Procedures; Scope of Rules

§ 1030.111 Formal administrative proceedings.

The Office may institute a formal administrative proceeding when, on the basis of facts known to the Office, there is reason to believe that any person (hereinafter referred to as "respondent") has violated any requirement of the Program. Such proceedings may include, but are not limited to, allegations that the respondent has failed to comply with or is in violation, willfully or otherwise, of any such agency action; or that the respondent has made a transaction with intent to evade any requirement of the Program. Such proceedings shall be conducted in accordance with procedures that will assure due process of law to any party who may be adversely affected because of the determination therein.

§ 1030.112 Scope of the rules in this part.

(a) The rules in this part govern procedure in formal administrative proceedings described in § 1030.111.

(b) Except as specifically provided, the rules in this part do not govern any other proceedings, such as negotiations for the entry of consent orders, investigative hearings pursuant to § 1020.131 of this chapter, applications for specific authorizations or exemptions, or promulgation of substantive rules and regulations, general bulletins, interpretative opinions, or other rule making procedures.

Subpart B—Notice; Answer; Other Pleadings

§ 1030.211 Commencement of proceedings.

A formal administrative proceeding is commenced by the issuance and service of a notice, signed by the Director of the Office, containing the following:

(a) A clear and concise statement of facts sufficient to inform the respondent with reasonable definiteness of the type of acts or practices alleged to constitute a violation;

(b) Designation of specific requirements of the Program actions alleged to have been violated;

(c) A statement that the notice has been issued upon representations of the Director of the Compliance Division as summarized in the notice, and that respondent will have the opportunity to controvert the same;

(d) The substance of §§ 1030.212 and 1030.213;

(e) Specification of the time and place for hearing, such time to be at least twenty (20) days after service of the notice unless it is found and so stated in the notice that the public interest requires a shorter period;

(f) Identification of the person who will preside over the hearing and/or prehearing matters (hereinafter referred to as the "hearing examiner") and of the representative or representatives of the Compliance Division designated to prosecute the matter;

(g) A form of order which the Office has reason to believe should issue if the facts are found to be as alleged in the notice; and

(h) Recital of the legal authority and jurisdiction for institution of the proceeding.

§ 1030.212 Answer.

(a) A respondent shall, except as provided otherwise pursuant to § 1030.211 (e), have twenty (20) days after service of such notice within which to file an answer.

(b) Each answer shall contain a specific admission, denial, or explanation of each fact alleged in the notice or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a notice not specifically answered pursuant to this paragraph shall be deemed to have been admitted.

(c) Each answer shall contain a concise statement of each defense or affirmative matter that respondent will present, including a concise statement of the facts upon which it is founded. No defense or affirmative matter of which the respondent was aware at the time of filing his answer but did not include therein may be added by way of amendment or supplemental pleading under §§ 1030.221–1030.223, unless the hearing examiner, in his discretion, is convinced that respondent's failure was justifiable and that the interests of justice require its later admission.

§ 1030.213 Default.

Failure of the respondent to file an answer within the time provided or to appear as ordered shall constitute a waiver of his right to appear and contest the allegations of the notice and shall authorize the Office, without further notice, to find the facts to be as alleged in the notice and to enter findings and an order thereon.

§ 1030.221 Amendments, by leave.

The hearing examiner may, in his discretion, in the interests of justice, to facilitate the determination of a controversy, and upon such terms as are just, allow amendments to the notice or answer at any time prior to the filing of his decision.

§ 1030.222 Amendments conforming pleadings to evidence.

When issues not raised by the notice or answer but reasonably within the scope thereof are tried by express or implied consent of the parties, they shall be treated in all respects as though they had been timely raised. Amendments necessary to make the notice or answer conform to the evidence and the raising of such issues shall be allowed at any time.

§ 1030.223 Supplemental pleadings.

The hearing examiner may, in his discretion, in the interests of justice, to facilitate the determination of a controversy, and upon such terms as are just, allow service of a supplemental notice or answer setting forth transactions, occurrences, or events which occurred or were discovered since the date of the notice or answer sought to be supplemented and which are relevant to any of the issues involved in the proceeding.

Subpart C—Prehearing Procedures; Motions; Discovery

§ 1030.311 Prehearing conferences.

(a) The hearing examiner may direct any or all parties to meet with him for a conference to consider any or all of the following:

(1) Simplification and clarification of the issues;

(2) Necessity or desirability of amendments to pleadings;

(3) Stipulations or admissions of fact and of the contents, authenticity, and admissibility of documents; and

(4) Such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of documents or other physical exhibits which will be offered in evidence in the course of the proceeding and of the names of witnesses.

(b) Prehearing conferences shall not be public unless all parties so agree.

(c) The hearing examiner, at his discretion, may direct that the prehearing conference be stenographically reported.

(d) When, as a result of a prehearing conference, it appears to the hearing examiner that the orderly, fair, and expeditious disposition of the proceeding will be aided thereby, he shall enter upon the record an order reciting any and all actions taken as a result of the conference. Insofar as such order states the issues to be resolved in the proceeding or the facts or documents which have been admitted to or stipulated by the parties, such order shall take precedence over any prior pleading or portion of the proceeding.

§ 1030.321 Motions.

(a) While a proceeding is before a hearing examiner all motions must be addressed to him. Copies of all written motions must be served upon each party.

(b) Motions should, if practicable, be in writing and shall state the particular order, ruling, or action desired and the grounds therefor. However, the hearing examiner may allow oral motions to be made before him, in appropriate cases, when each party affected or to be affected by such motion is present. Oral motions must be made upon the record.

(c) Within ten (10) days after service of any written motion, or within such longer or shorter time as may be fixed by the hearing examiner, the opposing party shall answer. Failure to answer shall constitute consent to the granting of the relief or sanction requested in the motion. The moving party will ordinarily have no right to reply.

(d) As a matter of discretion, the hearing examiner may waive the requirements of paragraphs (a) through (c) of this section as to motions for extensions of time and he may rule upon such motions ex parte.

(e) The hearing examiner shall rule, either in writing or upon the record, upon all motions presented to him. No formal opinion or findings are required on any motion.

§ 1030.326 Interlocutory appeals.

No interlocutory appeal to the decision officer (see § 1030.510) will be allowed from any decision of the hearing examiner unless the hearing examiner certifies that the ruling involves an important question of law that should be resolved at that time.

§ 1030.331 Discovery.

(a) The Federal Rules of Civil Procedure shall apply to discovery proceedings. There will be no fixed rule on priority of discovery.

(b) Discovery (including requests for admission) and compulsory process for discovery shall be available to the parties to a formal administrative proceeding under this part. Upon written motion pursuant to § 1030.321, the hearing examiner shall promptly rule upon any objection to discovery action initiated pursuant to this section. The hearing examiner shall also have the power to grant a protective order or relief to any party or third party subjected to discovery or compulsory process for discovery.

Subpart D—Hearings

§ 1030.411 Public hearings.

All hearings in formal administrative proceedings shall be public unless otherwise ordered by the hearing examiner.

§ 1030.412 Expedition of hearings.

Hearings shall proceed with all reasonable expedition, be held at one place, and continue without suspension until concluded, unless the hearing examiner specifically provides otherwise. The hearing examiner may, in the interests of justice, in order to assure full and fair presentation of the issues, and consistent with the public interest in the expeditious administration and enforcement of the Program, order brief intervals in any proceeding. In unusual and exceptional circumstances, for good cause stated on the record, he shall have the authority to order hearings at more than one place and to order brief intervals to permit discovery necessarily deferred during the prehearing procedures.

§ 1030.413 Rights of parties.

Every party shall have the right of representation by counsel, due notice, presentation of evidence, objection, cross-examination, motion argument, determination upon a record, and all other rights essential to a fair hearing.

§ 1030.414 Examination of witnesses.

An adverse party, or an officer, agent, or employee thereof, and any witness determined by the hearing examiner to be hostile, unwilling, or evasive, may be interrogated by leading questions. Any witness may be contradicted and impeached by any party, including the party calling him.

§ 1030.415 Admissibility of evidence.

Technical rules of evidence shall not apply in proceedings under this part. Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of admissible documents shall be segregated and excluded so far as practicable.

§ 1030.416 Objections.

Objections to evidence shall be timely and shall briefly state the grounds relied upon but the transcript shall not include argument or debate thereon except as ordered by the hearing examiner. The hearing examiner shall, when requested by a party, rule upon the record on any properly presented objection, or specifically defer such ruling. Any objection not ruled upon shall be deemed overruled. The substance of any overruled objection shall be deemed preserved without formal exception.

§ 1030.417 Burden of proof.

Counsel representing the Compliance Division shall have the burden of persuasion and the burden of going forward with evidence to show, prima facie, that respondent failed to comply with a requirement of the Program, but the proponent of any proposition shall be required to sustain the burden of persuasion and the burden of going forward with evidence with respect thereto.

§ 1030.418 Use of information obtained in investigations.

Any documents, papers, books, physical exhibits, or other materials or information obtained by the Office under any of its powers may be disclosed by counsel representing the Compliance Division when necessary in connection with formal administrative proceedings and may be offered in evidence by such counsel in any such proceeding.

§ 1030.421 Transcript.

Hearings shall be stenographically recorded and transcribed by a reporter under the supervision of the hearing examiner. The original transcript shall be a part of the record and the sole official transcript.

§ 1030.422 Record.

The record shall include the pleadings, all motions, all orders of the hearing

examiner, the original transcript, all exhibits offered in evidence by any party, all proposed findings of fact, conclusions, and orders, and the recommended decision and proposed order of the hearing examiner. Except as provided under § 1030.451, the record shall be open to public inspection during business hours at the Department of Commerce, Office of Foreign Direct Investments, upon application therefor to the Clerk.

§ 1030.423 Excluded evidence.

When an objection to a question propounded to a witness is sustained, the examining attorney may make a specific offer on the record of what he expected to prove by the answer of the witness, or the hearing examiner may, in his discretion, hear and record the evidence in full. Rejected exhibits, adequately marked for identification, and other rejected evidence shall be retained in the record and be available for consideration by any reviewing authority.

§ 1030.431 Hearing examiners.

(a) Hearings and prehearing matters in formal administrative proceedings shall be presided over by a hearing examiner appointed or designated pursuant to section 3105 or section 3344 of title 5, United States Code.

(b) The hearing examiner for prehearing matters may differ from the hearing examiner presiding over the hearing. A hearing examiner who opens the hearings under a particular notice shall, in the ordinary course, be the sole hearing examiner for such hearings, but, in the event of the death, illness, or other unavailability of a hearing examiner, or other extenuating and unusual circumstances, another hearing examiner may be appointed as provided in paragraph (a) of this section.

(c) In the event of the substitution of a new hearing examiner for the one originally designated, any motion predicated upon such substitution shall be made within five (5) days following notice of such substitution.

§ 1030.433 Powers and duties.

Hearing examiners shall conduct fair and impartial hearings, take all necessary action to avoid delay in the disposition of proceedings, and maintain order. They shall have all powers necessary and appropriate to that end, including, but not limited to, the following:

(a) To administer oaths and receive affirmations;

(b) To issue compulsory process;

(c) To take depositions or to order depositions or other discovery procedures as provided in § 1030.331;

(d) To rule upon offers of proof and receive evidence;

(e) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(f) To hold conferences for stipulations, simplification of issues, settlement, or any other proper purpose;

(g) To consider and rule upon, as justice may require, all procedural and other motions;

(h) To make findings of fact and conclusions of law and to issue recommended decisions and proposed orders and

(i) To take any action authorized by the rules in this part or in conformance with law.

§ 1030.434 Suspension of attorneys.

(a) The hearing examiner shall have the authority, for good cause stated on the record, to suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his direction, or who shall be guilty of disorderly, dilatory, obstructive, or contumacious conduct in the course of such proceeding.

(b) Any attorney so suspended or barred may appeal to the decision officer. Appeals shall be in the form of a brief, not to exceed ten (10) pages in length and shall be filed within five (5) days after notice of the hearing examiner's action. Answer thereto may be filed within five (5) days after service of the appeal brief and may not exceed ten (10) pages. The decision of the decision officer shall constitute final agency action. The appeal shall not operate to suspend the hearing unless otherwise ordered by the decision officer. In the event the hearing is not suspended, the attorney may continue to participate therein pending disposition of the appeal.

§ 1030.451 In camera policy.

(a) Hearing examiners shall have the authority, for good cause stated on the record, to order any documents, or oral testimony, or other matter offered in evidence, whether admitted or rejected, to be placed in camera.

(b) Except as provided in paragraph (c) of this section, matter placed in camera is kept confidential and is not part of the public record. Only the respondent, his counsel, authorized personnel of the Office and court personnel concerned with judicial review shall have access to such matter. Where it is appropriate, in order to protect a trade secret or other confidential business information, the hearing examiner may enter other orders necessary and appropriate to protect such information from misuse.

(c) The power of the hearing examiner, the Office and reviewing courts to disclose in camera matter to the extent necessary for the proper disposition of a proceeding is specifically reserved.

§ 1030.461 Submission by the parties of proposed findings, conclusions, and order.

(a) Within such time after the close of the reception of the evidence as the hearing examiner may fix, each party to a proceeding under this part shall file with the hearing examiner for his consideration all proposed findings of fact, conclusions of law, and forms of order, together with briefs in support thereof. Answering briefs may be filed within a reasonable time thereafter, as fixed by the hearing examiner, in his discretion, may vary the sequence of filing documents following the close of reception of evidence.

(b) Such proposed findings, conclusions, and orders and any briefs or other papers shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. "Passim" references to the record may not be used.

(c) If a party fails to file a proposed finding as to any fact involved in the proceeding, or a proposed conclusion of law as to any legal question raised by the proceeding, he shall be deemed to have waived any objections or contentions with regard to that fact or that question of law.

§ 1030.471 Hearing examiner's findings, conclusions, recommended decision and proposed order.

(a) Within a reasonable time after receipt of all briefs and/or other papers pursuant to § 1030.461, the hearing examiner who presided, unless he shall become unavailable to the Office, shall make findings of fact and conclusions of law and issue a recommended decision and proposed order. The findings, conclusions, recommended decision and proposed order shall be served upon the parties and shall be included in the record.

(b) The findings of fact and conclusions of law shall be numbered and shall contain appropriate references to the record.

§ 1030.472 Form of proposed order.

(a) If the hearing examiner determines that the respondent has not violated any requirement of the Program, he shall in his proposed order dismiss the notice.

(b) If the hearing examiner determines that the respondent has violated any requirement of the Program, he shall issue a proposed order taking into account, in fashioning said proposed order, the nature and circumstances of the violation as well as the importance of encouraging future good faith efforts to comply with the Program. Where appropriate (including, but not limited to, cases where the respondent's violation involves positive direct investment or the holding of liquid foreign balances under circumstances where such is prohibited or in excess of the amount generally and/or specifically authorized or failure to comply with conditions of specific authorizations, and/or willful failure to or delay in filing required reports) the proposed order may include in addition to any other appropriate remedies:

(1) Reduction during any year or years in the amount of positive direct investment and/or liquid foreign balances that would have been authorized to the respondent under Part 1000 of this chapter;

(2) A requirement that the respondent repatriate all or part of its share in the earnings of incorporated affiliated foreign nationals, which repatriation shall be disregarded for the purpose of measuring compliance with the provisions of Part 1000 of this chapter;

(3) A requirement that the respondent cause its affiliated foreign nationals to make transfers of capital to the respondent, which transfers shall be disregarded for the purpose of measuring compliance with the provisions of Part 1000 of this chapter;

(4) A requirement that the respondent repatriate available proceeds of long-term foreign borrowing, which proceeds may not be held thereafter in the form of foreign balances or other foreign property;

(5) A requirement that quarterly or other special reports be filed with the Office containing such information as may be appropriate.

Subpart E—Decision and Review

§ 1030.510 Decision officer: designation and disqualification.

(a) The Director of the Office shall be the decision officer unless he is unavailable by reason of disqualification or otherwise, in which case the Deputy Director of the Office shall be the decision officer.

(b) The decision officer shall withdraw from any case when he is disqualified by reason of personal relationship or interest or other just cause. If the decision officer has not withdrawn from the case and respondent believes that grounds for disqualification exist, respondent shall submit, with its first brief submitted pursuant to § 1030.511, a motion supported by an affidavit or affidavits specifying such grounds with particularity. In such case, the decision officer shall himself rule upon the motion in writing and his decision shall become part of the record of the case.

(c) If both the Director and the Deputy Director of the Office are disqualified or otherwise unavailable, the Appeals Board for the Department of Commerce shall perform the functions of the decision officer under the rules contained in this subpart, and the decision and order of the Appeals Board shall constitute the final agency action.

§ 1030.511 Objections.

(a) Any party in a proceeding under this part may file specific objections to the hearing examiner's findings of fact, conclusions of law, recommended decision and/or proposed order, provided that notice of intent to file such objections is filed with the Office within ten (10) days after service upon the parties of the hearing examiner's recommended decision and proposed order.

(b) Objections shall be in the form of a brief, not to exceed thirty (30) pages, filed no later than thirty (30) days after service of the hearing examiner's recommended decision and proposed order. Answering briefs, not to exceed thirty (30) pages, shall be filed not later than thirty (30) days after the closing date for submission of each objections. Reply briefs, not to exceed fifteen (15) pages, shall be filed not later than seven (7) days after the closing date for submission of answering briefs. Briefs, if typewritten, shall be double spaced.

(c) The briefs shall be made a part of the record and the entire record shall then be certified promptly to the decision officer.

(d) If no notice of intent to file objections to the hearing examiner's findings of fact, conclusions of law, recommended decision or proposed order are filed within the time provided in paragraph (a) of this section, the record shall be certified at the conclusion of such time to the decision officer who shall decide the case in the manner provided in § 1030.513 (b). The decision officer may, at his discretion, request the parties to submit briefs on any or all of the issues raised by the record.

§ 1030.513 Decision.

(a) If objections are filed pursuant to § 1030.511, unless all parties have stipulated otherwise in writing, there shall be oral argument before the decision officer at a date and time set by him in writing and served on all parties, which argument shall be reported stenographically. The original transcript shall be made a part of the record. Each party shall be limited to thirty (30) minutes for presentation of oral argument, unless the decision officer shall determine that the circumstances of the case require more lengthy presentation.

(b) The decision officer, in deciding a matter, shall not be limited to consideration of the issues raised by the parties, but may consider all issues raised by the record.

(c) Within a reasonable time after receipt and consideration of the record and oral argument, if any, the decision officer shall do one of the following:

(1) Remand the case to the hearing examiner for the reception of additional evidence;

(2) Issue an interlocutory decision, either orally or in writing, with respect to the issues of fact and questions of law involved in the proceeding. Thereafter, in his discretion, he may direct the hearing examiner to conduct a separate hearing on relief and form of order. The decision officer may permit the filing of additional briefs and may request that the prevailing party or parties propose a form of order and the other party or parties comment thereon, or that all parties present their views concurrently. Any failure to object to any part of a form of order proposed by a prevailing party will constitute a waiver of objection to it. The decision officer shall then render a decision as specified in subparagraph (3) of this paragraph;

(3) Issue findings of fact and conclusions of law and render a decision that adopts, modifies or sets aside the hearing examiner's findings, conclusions and recommended decision and states the reasons for his action, and enter an order which shall be served on each party to the proceeding.

(d) The order entered by the decision officer shall become effective ten (10) days after service thereof, unless the respondent appeals to the Appeals Board for the Department of Commerce, pursuant to the procedure set out in Part 1035 of this chapter or files a petition for reconsideration under § 1030.515.

§ 1030.514 Appeals from orders under Part 1020 of this chapter.

Any party appealing from the denial of a motion under § 1020.123 of this chapter, shall file an appeal brief, not to exceed thirty (30) pages, within seven (7) days after service of the order denying said motion. The answering brief, not to exceed thirty (30) pages, shall be filed within seven (7) days thereafter. Oral argument will not be allowed. Within a reasonable time after receipt of the briefs, the decision officer shall render an appropriate decision.

§ 1030.515 Petition for reconsideration.

Any party may petition for reconsideration of a final decision or order of the decision officer by filing a written brief with the Office stating succinctly and with particularity the grounds upon which reconsideration is being sought within five (5) days after the date of service of the decision officer's order. The decision officer shall thereafter enter as promptly as possible an order either granting or denying the petition.

PART 1035—RULES OF PRACTICE FOR APPEALS IN PROCEEDINGS ORIGINATING UNDER PART 1030

Sec.

AUTHORITY: The provisions of this Part 1035 issued pursuant to sec. 5 of the Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan. 1, 1968, 33 F.R. 47; Department Organization Order 25-3A (formerly Department Order 184-A), Jan. 1, 1968, 33 F.R. 54.

§ 1035.101 Scope of rules.

The rules of practice in this part shall govern appeals from final decisions of the decision officer in proceedings originating under Part 1030 of this chapter. Appeals in proceedings originating under Part 1000 of this chapter shall be governed by § 1000.802 of this chapter.

§ 1035.102 Board.

(a) The Appeals Board for the Department of Commerce (referred to in this part as the "Board") shall have sole and exclusive jurisdiction to hear administrative appeals from final decisions of decision officers in proceedings under Part 1030 of this chapter. The decision of the Board shall constitute final agency action.

(b) The Chairman of the Board shall designate a panel of three Board members, from time to time, to pass upon such appeals.

(c) All communications to the Board shall be addressed to: Chairman, Department of Commerce Appeals Board.

Department of Commerce, Washington, D.C. 20230, and shall be in writing.

§ 1035.103 Appeals.

(a) The respondent in a proceeding under Part 1030 of this chapter may appeal to the Board from the decision and order of the decision officer, provided that notice of intent to appeal is filed with the Board within ten (10) days after service of the decision officer's decision and order or, if the respondent files a petition for reconsideration of the decision officer's order (pursuant to § 1030.515 of this chapter), notice of intent to appeal shall be filed with the Board within ten (10) days after the date of service of the decision officer's order either denying the petition for reconsideration or disposing of a petition that had been granted.

(b) The respondent, in a proceeding under Part 1030 of this chapter, may appeal on the following grounds: that prejudicial error of law was committed; that the findings were clearly erroneous or were not supported by substantial evidence; or that the provisions of the order are arbitrary, capricious or an abuse of discretion.

§ 1035.104 Certification of the record.

Promptly after the filing of notice of intent to appeal, the record including the decision and order of the decision officer, and any petition for reconsideration and order relating thereto, shall be certified to the Board.

§ 1035.105 Briefs.

(a) The appeal brief shall be served and filed no later than thirty (30) days after service of the appropriate order of the decision officer (determined pursuant to § 1035.103(a)); the answering brief shall be served and filed no later than thirty (30) days after service of the appeal brief; and the reply brief shall be served and filed no later than seven (7) days after service of the answering brief. The appeal and answering briefs shall not exceed thirty (30) pages (if typewritten, double spaced) exclusive of appendices, and the reply brief shall not exceed fifteen (15) pages.

(b) An original and five (5) copies of each brief shall be filed with the Board and three (3) copies shall be served upon each party to the proceeding, including the Office.

(c) The appeal and answering briefs shall contain in the following order:

(1) Index, table of cases, statutes, and other authorities—and page references thereto;

(2) Concise, nonargumentative statement of facts, with specific page references to the record to support each assertion;

(3) Argument, with specific page references to the record to support each assertion;

(4) Conclusion;

(5) Appendix (optional), any record material or exhibits on which the party places particular reliance.

(d) The appeal brief shall, in addition, include in the argument section a specific explanation of how the grounds for appeal fall within the standards of § 1035.103(b), and, following the conclusion, any form of order that the respondent proposes be issued in lieu of the order issued by the decision officer.

§ 1035.107 Oral argument.

The Board will ordinarily determine an appeal on the basis of the briefs. The Board will allow oral argument only in exceptional cases when it deems it necessary, upon its own motion.

§ 1035.108 Disposition of appeals by Board.

(a) The appeal shall be determined upon the basis of the record and the briefs and argument, and shall not constitute a hearing de novo. The Board shall not substitute its discretion for that of the decision officer in any matter involving expertise in interpreting, defining, administering, or effectuating the policies and purposes of the regulations or other agency actions under the Program. The Board shall not consider facts or arguments affecting the merits of the policies embodied in the regulations or other agency actions alleged to have been violated.

(b) Unless two members of the Board are of the opinion, and so advise the Chairman of the Board in writing within 20 days after the date of the filing of the appeal brief, that they desire to grant the appeal or consider further briefs or arguments, the Chairman of the Board shall, on the 20th day after the date of the filing of the appeal brief, enter an order pursuant to § 1035.109(b).

§ 1035.109 Content of orders.

(a) The grant of an appeal may be by an order remanding the matter to the decision officer, accompanied with a brief statement of reasons therefor.

(b) The denial of an appeal ordinarily will be in the form of an order signed by the Chairman of the Board, stating that the appeal was denied by the Board on a particular date, and ordinarily will not be accompanied by an explanatory statement. Such denial without an explanatory statement shall be deemed equivalent to adoption by the Board of the decision officer's decision.

(c) Where the Board grants an appeal in part and denies it in part, it ordinarily will remand the matter to the decision officer, as specified in paragraph (a) of this section. Where the Board can appropriately dispose of such a matter by entering its own order, rather than by remanding the matter, it may do so.

(d) Entry of an order by the Board shall be effective ten (10) days after service thereof.

PART 1040—COMPLIANCE PROCEDURES; REPORTS, ADVISORY OPINIONS, AND ENFORCEMENT

Subpart A—Compliance Reports

Subpart B—Advisory Opinions on Compliance

Subpart C—Enforcement

AUTHORITY: The provisions of this Part 1040 issued pursuant to sec. 5 of the Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan. 1, 1968, 33 F.R. 47; Department Organization Order 25-3A (formerly Department Order 184-A), Jan. 1, 1968, 33 F.R. 54.

Subpart A—Compliance Reports

§ 1040.111 Compliance reports following Parts 1030 or 1035 orders.

(a) Whenever, in a proceeding under Parts 1030 or 1035, an order is entered requiring the respondent to refrain from or to undertake any future act or practice, the Office will further require the respondent to file a compliance report with the Office. Such requirement will be by action of the Director of the Compliance Division pursuant to § 1020.121(a)(2) of this chapter.

(b) Such report shall be in writing, signed by the respondent or an officer thereof, be made under oath or affirmation, and be filed with the Office, Attention: Director of Compliance Division.

(c) Such report shall set forth in detail the manner and form of the respondent's compliance with each of the provisions of the order.

(d) Such report shall be filed within twenty (20) days after the order becomes effective unless the Director of the Compliance Division, upon timely request, extends such time. Further and subsequent reports may also be required by the Director of the Compliance Division.

§ 1040.114 Noncompliance with reporting requirements.

In cases of failure to comply with compliance report requirements, the Office may initiate appropriate action pursuant to § 1020.141 of this chapter.

§ 1040.121 Comment on report.

The Office will review compliance reports. The Director of the Compliance Division may comment in writing to the respondent in respect to whether the actions set forth in such a report evidence compliance with the order.

Subpart B—Advisory Opinions on Compliance

§ 1040.211 Request for opinion.

Any respondent subject to an order issued under Parts 1030 or 1035 of this chapter may request advice from the Office as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing and should include full information regarding the proposed course of action.

§ 1040.212 Response by Office.

On the basis of the facts submitted as well as other information properly available to it, the Office will, where it is practicable and otherwise appropriate, by letter signed by the Director of the Compliance Division, inform the respondent whether the proposed course of action, if pursued, would constitute compliance with the order. The Office expressly reserves the power to take such other and/or additional action as the public interest may require.

§ 1040.214 Advisory opinion during compliance investigation.

Once the Office has instituted an investigation to determine whether a respondent is in violation of an outstanding order issued against it, the Office will ordinarily consider it inappropriate to give the respondent an advisory opinion on the subject. No request for an advisory opinion, in such circumstances, will ordinarily cause the Office to discontinue such investigation.

§ 1040.221 Revocation.

The Office may, at any time, reconsider any advice or comment made under § 1040.121 or § 1040.212, and rescind, alter, or revoke the same. If it does so, the Office will, whenever possible, give prompt notice to the respondent.

§ 1040.222 Reliance.

(a) When the Office believes that a respondent has violated an order issued against it under Parts 1030 or 1035 of this chapter but the respondent establishes to the Office that it acted in actual, properly warranted, and good faith reliance upon written advice to it under § 1040.121 or § 1040.212, then the Office will not proceed or recommend any proceeding against such respondent in respect to such possible violation without first giving respondent notice under § 1040.221 and an opportunity to discontinue the questioned practice or transaction and to correct the effects thereof.

(b) If the respondent effects such discontinuance and correction promptly and fully, and satisfies the Office that it is complying with the requirements of the Program in regard to the matter, then the Office will take no further action.

Subpart C—Enforcement

§ 1040.311 Enforcement.

When the Office has information indicating that a respondent has failed or is failing to comply with the provisions of an order entered against the respondent under Part 1030, the Office may institute or recommend a civil or criminal enforcement proceeding (see, e.g., 50 U.S.C. App. 5(b)(3), 17) or a further administrative proceeding under Part 1030 of this chapter.

PART 1050—MISCELLANEOUS RULES

Sec.

AUTHORITY: The provisions of this Part 1050 issued pursuant to sec. 5 of the Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan. 1, 1968, 33 F.R. 47; Department Organization Order 25–3A (formerly Department Order 184–A), Jan. 1, 1968, 33 F.R. 54.

§ 1050.101 Appearances.

(a) *Qualifications.* (1) Members of the bar of a Federal Court or of the highest court of any State or territory of the United States are eligible to practice before the Office and the Appeals Board for the Department of Commerce in any proceeding under Parts 1020–1050 of this chapter.

(2) Any individual or member of a partnership involved in any such proceeding may appear on behalf of himself or of such partnership, upon adequate identification. A corporation or association may be represented by an officer thereof.

(3) Accountants who are authorized to practice in any State or territory of the United States are eligible to appear before the Office on behalf of any person or party in matters arising under Part 1025 or 1040 of this chapter.

(b) *Notice of appearance.* Any person desiring to appear before the Office on behalf of a person or party shall file a written notice of his appearance, stating the basis of his eligibility under this section. No other application shall be required for admission to practice, and no register of attorneys will be maintained.

§ 1050.102 Standards of conduct.

(a) All attorneys practicing before the Office shall conform to the standards of ethical conduct required of practitioners in the courts of the United States. Accountants who prepare reports or other documents for submittal to the Office or who appear before the Office shall conform to the standards of ethical conduct prescribed by the State Board of Accountancy or other licensing authority for the State in which such accountant maintains his principal place of business.

(b) If the Office has reason to believe that any person is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Office may issue an order requiring such person to show cause why he should not be suspended or disbarred from practice or appearance before, or from the preparation of reports or other documents for submittal to, the Office. The alleged offender shall be granted due opportunity to be heard and may be represented by counsel. Thereafter, if warranted by the facts, the Office may issue against the person an order of reprimand, suspension, disbarment, or other appropriate sanction.

§ 1050.103 Requirements as to form and filing of documents.

(a) *Filing.* In formal administrative proceedings under Part 1030 of this chapter, except as otherwise provided, all documents submitted to the Office shall be addressed to the hearing examiner. Where practicable, such documents shall be filed with him; otherwise, they shall be filed with the Clerk (see § 1050.104). Informational applications or requests, however, may be submitted directly to the official in charge thereof or to the Director of the appropriate Division.

(b) *Title.* Documents shall clearly show the file or docket number and title of the matter in connection with which they are filed.

(c) *Copies.* Five copies of all formal documents shall be filed, unless otherwise specified. Informal applications and correspondence should be submitted in the form of an original and two copies thereof.

(d) *Form.* (1) Documents shall be printed, typewritten (double spaced) or otherwise processed in permanent form.

(2) Wherever practicable, documents shall be on paper approximately 8½ inches by 11 inches, bound or stapled on the left side.

(e) *Signature.* One copy of each document filed shall be signed by a person who has entered an appearance (or in informal matters by a person qualified to do so).

§ 1050.104 Clerk.

The Director of the Office shall designate an employee of the Office to serve as Clerk of the Office. The Clerk shall, in general, perform the functions of the Clerk of a district court, in respect to the proceedings under Part 1030 of this chapter and where otherwise appropriate. Papers may be filed with him; he shall accept and record receipt of formal papers; he shall enter the orders of hearing examiners and cause them to be served upon parties. Where it is appropriate, the Clerk shall sign documents and other papers in the name of the Office. Nothing contained in this section shall be deemed to preclude the Clerk from performing any other functions within the Office.

§ 1050.105 Time computation.

Computation of any period of time prescribed or allowed under Parts 1020–1040 of this chapter shall begin with the first business day following that on which the act, event, or development initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national holiday, or other day on which the Office is closed, the period shall run until the end of the next following business day. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, is 5 days or less, each Saturday, Sunday, and any such holiday shall be excluded from the computation. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, exceeds 5 days, each of the Saturdays, Sundays, and such holidays shall be included in the computation.

§ 1050.106 Service.

(a) *By the Office.* (1) Service of notices, orders, and other processes of the Office or a hearing examiner may be effected as follows:

(i) *By registered or certified mail.* A copy of the document shall be addressed to the person to be served, at its residence, office, or place of business, and sent thereto by registered or certified mail; or

(ii) *By delivery to an individual.* A copy thereof may be delivered to the natural person to be served, or to a member of the partnership to be served, or to any officer or director of the corporation or unincorporated association to be served; or

(iii) *By delivery to an address.* A copy thereof may be left at the office or place of business of the person, or it may be left at the residence of the person or of a member of the partnership or of an officer or director of the corporation or unincorporated association to be served.

(2) All other documents may be similarly served, or they may be served by ordinary first-class mail.

(b) *By other parties.* Service of documents by parties other than the Office shall be by delivering copies thereof as follows: Upon the Office, by personal delivery or delivery by first-class mail to the Clerk; upon any other party, by delivery to the party, as specified in paragraph (a) of this section.

(c) *Service on attorney of party.* When a party is represented by a person qualified pursuant to § 1050.101(a), and such representative has filed a notice of appearance as required by § 1050.101(b), or has filed any pleading or other document on behalf of the party, any notice, order, or other process or communication required or permitted to be served upon a person or party may be served upon such representative in lieu of any other service.

(d) *Proof of service.* (1) When service is by registered, certified, or ordinary first class, it is complete upon delivery of the document by the post office to the person served.

(2) The return post office receipt for a document registered or certified and mailed, or the verified return or certificate by the person serving the document by personal delivery, shall be proof of the service of the document. All documents served by ordinary mail shall have appended thereto a certificate of service, setting forth the manner of said service, including the address of any person so served.

§ 1050.107 Fees.

(a) *Witnesses.* Any person compelled to appear in person in response to compulsory process shall, upon his application therefor, be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) *Responsibility.* The fees and mileage referred to in this section shall be paid by the party at whose instance the witness appears.

§ 1050.108 Ex parte communications.

(a) In a formal administrative proceeding, no person not employed by the Office and no employee or agent of the Office who performs any investigative or prosecuting function in connection with the proceeding, shall communicate ex parte, directly or indirectly, with any person involved in the decisional process in such proceeding, with respect to the merits of that or a factually related proceeding.

(b) In a formal administrative proceeding, no person involved in the decisional process of such proceeding shall communicate ex parte, directly or indirectly, with any person not employed by the Office, or with any employee or agent of the Office who performs any investigative or prosecuting function in connection with the proceedings, with respect to the merits of that or a factually related proceeding.

(c) In a formal administrative proceeding, if an ex parte communication is made to or by any employee involved in the decisional process, in violation of paragraph (a) or (b) of this section, such employee shall promptly inform the Office of the substance of such communication and the circumstances thereof. The Office will take such action thereon as it may consider appropriate.

§ 1050.111 Freedom of information.

(a) All documents (including transcripts) filed in formal administrative proceedings conducted under Part 1030 of this chapter (except those documents placed in camera pursuant to § 1030.451 (b) of this chapter), and such other documents as the Office may from time to time designate, shall be made part of the public records of the Office. Copies thereof are maintained for public inspection and copying in the office of the Clerk (see § 1050.104).

(b) For good cause shown and upon application by any party submitting a document that is to be placed on the public record, pursuant to paragraph (a) of this section, the Office may excise trade secrets and customarily privileged commercial or financial information obtained from any person. Requests for such excision may be made by timely submittal to the Office of a written request specifying with particularity each item sought to be excised and setting forth in each instance a full statement of the party's business reasons for requesting excision. Mere conclusory allegations and requests that an entire document be omitted from the public record will not be deemed to satisfy the requirements of this paragraph.

(c) All documents of any description received by the Office from any person in connection with an investigation of possible noncompliance with the Program, and not described in paragraph (a) of this section, are considered part of the investigatory files of the Office, compiled for law enforcement purposes, and will not be disclosed to any person except pursuant to law.

(d) Terms used in this section shall have the meanings ascribed thereto in 5 U.S.C. §§ 551–553.

Effective date. The amendments to Parts 1020–1050 shall be effective as of the date of publication in final form in the FEDERAL REGISTER, and shall govern all proceedings commenced after the effective date and all pending proceedings except to the extent that the Director of the Office determines, in his discretion, that application of the amendments or any portion thereof in a pending proceeding would not be feasible or would work injustice, in which case the appropriate former rule or rules shall apply.

U.S. DEPARTMENT OF COMMERCE
Office of Foreign Direct Investments
Washington, D.C. 20230

June 16, 1972

MEMORANDUM FOR: Direct Investors

From: William V. Hoyt
Director

Subject: Revised Instructions for Submitting Applications for Specific Authorizations, Specific Exemptions, or Interpretations

Revised instructions for submitting applications for specific authorizations, specific exemptions, or interpretative opinions with respect to the Foreign Direct Investment Regulations during 1972 are attached. These revised instructions supersede the instructions issued on February 23, 1971.

Major changes from the February 23, 1971 instructions include a new part II(J)(Expropriation) and new material added to Part II(B)(Merchandise Export Credit), and Part II(D)(Foreign Equity Financing). The addition of new material with respect to merchandise export credit is intended to liberalize Office policy. As outlined in further detail in the attached material, specific authorizations will be granted, subject to certain limitations, so that the Regulations will not restrict direct investors in extending export financing to their affiliated foreign nationals in the ordinary course of business pursuant to arms-length terms.

Direct investors should note that persons subject to the Regulations may apply for relief from any provision thereof through a specific exemption or authorization. Thus, while the attached instructions contain guidelines for the most common situations, applications relevant to other situations may, of course, be submitted.

Direct investors are cautioned that they should never anticipate receiving any specific authorization or exemption based solely on their reading of the attached guidelines, or on the fact that they have received similar relief in the past, or on informal

indications of Office policy. Each specific authorization or exemption is determined on the basis of the individual facts and circumstances of each application.

A filing deadline of November 1, 1972 has been established for those applications requesting relief affecting positive direct investment in 1972. Applications received after the deadline will be accorded a lower processing priority than applications filed on time. The Office can give no assurance that it will be able to process a late-filed application by December 31, 1972. Because of the proposed special two-month extension into 1973 for achieving compliance for 1972, the Office will generally be able to process late-filed applications within such extension period; but the direct investor will have reduced flexibility in arranging compliance in the event the requested relief is denied. The Office will not process applications received after December 31, 1972 where the requested specific authorization or exemption affects positive direct investment in 1972, except in extraordinary circumstances.

Also, please note the following:

Merely filing a request for a specific authorization, specific exemption or interpretative opinion does not relieve a direct investor of its responsibility to be in compliance with the Regulations.

An application that does not include the documentation specified in these instructions will not be considered to have been filed until the omitted material is received in the Office.

The Office normally will not issue a specific authorization to a direct investor that has a compliance case pending with the Office, nor will it issue relief undoing the effect of a compliance settlement previously entered into by the direct investor.

Direct investors submitting applications early in the year will find that consultation with the Office will facilitate thorough analysis and consideration of their applications, and that the Office frequently can help direct investors structure their foreign activities so as to obtain the maximum benefit under both the Regulations and the terms of any specific authorization or exemption that might be issued.

Attachment

U.S. DEPARTMENT OF COMMERCE
Office of Foreign Direct Investments
Washington, D.C. 20230

June 16, 1972

(Amends and Supersedes Document
of February 23, 1971)

REVISED INSTRUCTIONS FOR SUBMITTING APPLICATIONS FOR SPECIFIC AUTHORIZATIONS, SPECIFIC EXEMPTIONS OR INTERPRETATIONS

A direct investor ("DI"), or a person not yet a DI, seeking a specific authorization, a specific exemption, or an interpretation with respect to the Foreign Direct Investment Regulations (the "Regulations") must submit a written application in accordance with these instructions. DIs with questions concerning these instructions may telephone the Director, Authorizations and Reports Division (Area Code 202-343-7333) with regard to specific authorizations and exemptions, the Chief Counsel (Area Code 202-343-7384) with regard to interpretative legal opinion and the Assistant Director for Audits and Accounting, Compliance Division (Area Code 202-343-7306) with regard to interpretative accounting opinions. DIs with questions concerning the proper preparation of reports may telephone or write the Chief, Program Reports Branch (Area Code 202-343-7314).

Introduction

A DI may apply for: (1) a specific authorization to effect transactions not generally authorized by the Regulations; (2) a specific exemption from complying with a requirement of the Regulations; and (3) an interpretative opinion stating how the Regulations apply to a particular factual situation.

Part II of this memorandum contains guidelines for specific authorizations in response to only the most common situations. However, DIs may face other situations which are not described in Part II and yet pose problems in complying with the Regulations. Applications relating to such situations may be submitted by including the information required by Part I, below, together with whatever additional information would be needed by the Office to evaluate the request.

PART I - APPLICATION FOR A SPECIFIC AUTHORIZATION OR EXEMPTION

PART II - COMMON CATEGORIES OF SPECIFIC AUTHORIZATIONS

(A) The Borrowing Test

(B) Merchandise Export Credit

(C) Reinvested Earnings

(D) Foreign Equity Financing

(E) Triangular and Parallel Financing

(F) Liquid Foreign Balances

(G) Upstreaming the §504(b) Earnings Allowable

(H) Capitalized Exploration Expenditures

(I) Change in Elections

(J) Expropriation of AFN Property

PART III - APPLICATION FOR AN INTERPRETATIVE OPINION

PART IV - APPLICATION FOR AN INTERPRETATIVE OPINION AND (OR IN THE ALTERNATIVE) A SPECIFIC AUTHORIZATION OR EXEMPTION

Applications and replies by this Office will be considered confidential communications.

I. APPLICATION FOR A SPECIFIC AUTHORIZATION OR EXEMPTION

An application for a specific authorization or exemption pursuant to §1000.801 of the Regulations (all sections hereinafter cited will refer to the Regulations and will omit the prefix "1000"), must be submitted in quadruplicate (including all attachments and enclosures) to the Director, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington D.C. 20230. Printed or written information previously supplied by a DI may be incorporated by reference in an application.

There is no prescribed form for an application. However, each application should contain, in addition to the relevant information appropriate to a particular request described in Part II, below, the following information.

1. Name and address of the DI.

2. A clear and precise statement of the request, with reference, to the extent possible, to amounts involved.

3. A brief description of the DI's business, the DI's most recent consolidated balance sheet and profit and loss statement and, where available, a copy of the DI's most recent annual report.

4. Business, economic and other considerations in support of the application.

5. The name, address and telephone number of at least two persons to whom requests for additional information or clarification may be addressed.

6. Proof of authority to file application as required by §803.

7. The date by which action on the application is desired.

8. In the case of an application by a member of an associated group, identification of each group affiliated foreign nationals ("group AFN").

9. Latest estimates by scheduled area of the following for 1972 (if previously reported estimates on FDI-102/102F are the latest available, copies of such reports may be submitted):

   (a) DI's share of reinvested earnings of incorporated AFNs.

   (b) Net transfers of capital.

   (c) The use of proceeds of long-term foreign borrowings.

   (d) Program direct investment.

   (e) Preliminary 1972 Supplement C to Form FDI-102/102F.

   (f) Reduction of 1972 allowable as a result of (a) compliance action, (b) condition of a prior specific authorization, or (c) §1003 repayment charges from prior or current years.

   (g) Available proceeds of long-term foreign borrowing as of December 31, 1971, (and, for DIs that elected under §306(e)(1) for 1971, as of February 29, 1972) and any net new long-term foreign borrowing anticipated during the 1972 compliance year.

(h) The schedular allocations or expenditures of proceeds of long-term foreign borrowing outstanding on December 31, 1971 (and, for DIs that elected under §306(e)(1) for 1971, as of February 29, 1972).

II. COMMON CATEGORIES OF SPECIFIC AUTHORIZATIONS

(A) The Borrowing Test

Under §§313(d)(1) and 306(e), the amount of positive direct investment charged to a DI in any year may be reduced by the amount of proceeds of long-term foreign borrowing (as defined in §324) expended in making transfers of capital or allocated to positive direct investment during that year. Accordingly, an application for specific authorization or exemption involving positive direct investment in excess of the amounts authorized under the Regulations generally must evidence the inability of the applicant to effect the borrowing necessary to achieve compliance. It should be emphasized that this test pertains to the consolidated foreign borrowing capacity of the DI, and not just to the financing of particular projects or AFNs. To obtain relief, applicants must submit documentation to demonstrate conclusively that:

1. Foreign debt financing has been attempted and cannot be arranged; or

2. Foreign debt financing can be arranged only with undue hardship.

An applicant seeking relief involving the borrowing test should submit its application to the Office before its direct investment activity exceeds the applicant's allowable during the compliance year with respect to which the request is made.

Applications of the types described in sections (B)-(J) below are not required to satisfy the borrowing test. The Office will also entertain applications for specific authorization arising from special circumstances in which the DI contends that the borrowing test should not be applicable.

(B) Merchandise Export Credit

The transfer of capital resulting from the calendar year net increase in export credit extended by a DI to its AFNs may be specifically authorized, as determined under whichever of the two formulas stated

below the DI elects. The amount of such relief will generally be limited to the DI's 1972 increase in exports to AFNs and will be usable only to cover positive direct investment arising from the net increase in export credits to AFNs.

Both formulas are based on the DI's worldwide export and export credit figures. One formula is the 1972 version of the formula used previously by the Office, in which the amount of relief is based on the historical relationship between the DI's export and export credit to AFNs. The other formula is a new one, in which the amount of relief is based on the amount of export credit that the DI certifies would have been extended to its AFNs in the ordinary course of business pursuant to arm's-length terms. Both formulas employ the terms "specified merchandise exports" and "specified merchandise export credits."

The term "specified merchandise exports" ("SME") means the aggregate dollar value charged on the DI's books of account for all merchandise exports by the DI or on its behalf (whether produced by the DI or other suppliers) from the United States during a specified period to all of its non-Canadian AFNs in one or more scheduled areas. (The term includes not only goods exported for resale or lease by AFNs in substantially unchanged form, but also all other exports to AFNs, such as capital equipment, raw materials or supplies for use or further processing by AFNs.) This valuation should be consistently applied, and the DI should restate the value of its exports to reflect f.a.s. ("free alongside ship") value if the value charged on the DI's books of account exceeds f.a.s. value by more than 10%. (F.a.s. value includes U.S. inland freight, insurance, and other charges to the point of export, but excludes freight and other charges beyond that point.)

The term "specified merchandise export credit" ("SMEC") means the aggregate dollar amount of credit outstanding on a specified date that is carried on the books of account of the DI (including, without limitation, advances, notes and open accounts) as having been extended by the DI to all of its non-Canadian AFNs in one or more scheduled areas in connection with specified merchandise exports to such AFNs. SMEC outstanding should not include any amounts resulting from intercompany transactions other than those arising directly from SME. If SMEC is not separately stated on the DI's books of account but is included in a general intercompany account, a detailed explanation of the methods used to derive SMEC should be included in the application.

[The addition of the following paragraph was announced in the Federal Register, vol. 37, no. 129, July 4, 1972:] Where SMEC computed under the last paragraph has been reduced or limited as a result of payments (derived from United States sources) that by virtue of § 312(c)(4) or (12), as applicable commencing July 1, 1972, do not constitute transfers of capital, SMEC will be appropriately adjusted for purposes of application for merchandise export credit relief. In general, DIs may anticipate that such adjustment will provide for export credit relief within these guidelines as if SMEC were not limited or reduced by such payments.

Neither SME nor SMEC includes figures for transactions in which the DI leases merchandise to AFNs.

The specific authorization for merchandise export credit will be computed under whichever of the following two formulas the DI elects, but normally will not exceed the net increase in SME and will in no event exceed the net increase in SMEC for the year.

1. Historical Formula

This formula is based on the amount of the 1972 increase in SMEC that would have resulted if the SMEC outstanding at the end of 1972 had been extended on the terms of SMEC for the three of the seven preceding years in which such terms have been the longest. Subject to the limitation of the 1972 increase in SME, the relief shall be calculated as the remainder obtained by subtracting the SMEC at December 31, 1971 from the product of the 1972 SME times the ratio of aggregate SMEC to aggregate SME for those three individual calendar years during 1965-71 in which such ratio was the highest. (Note: SMEC for any year shall include all export credits, even those exceeding one year; but if the SMEC/SME ratio for the three years in the aggregate exceeds 100%, then for purposes of calculating relief under the formula the ratio shall be deemed to be 100%.)

The DI's application shall include an exhibit setting forth, by scheduled area, projections for 1972 and actual data for 1965 through 1971 showing SME during each such year and SMEC outstanding as of December 31 of each such year. (For purposes of this application, export data during all such years for Spanish AFNs shall be included in Schedule B.)

Upon the DI's request, the Office will consider appropriate adjustments to SME and SMEC, for purposes of this formula, in the case of a DI who has shifted from exporting to non-AFNs to exporting to AFNs, and of a DI who has utilized U.S. bank discount facilities for export sales to AFNs in 1970 and 1971.

2. Alternate Formula

Subject to the limitation of the 1972 increase in SME, relief under this formula shall be determined by subtracting

the SMEC at December 31, 1971 from that part (which may be all) of the SMEC at December 31, 1972 that the DI certifies would have been outstanding if the credit terms to AFNs had not exceeded those that would have been extended in the ordinary course of business pursuant to arm's-length terms.

Such certification will be based on final data for 1972 and will be submitted with the DI's 1972 Annual Report. Although the amount of relief granted will depend on this certification, it is available only when specifically authorized in advance by the Office in response to a DI's request.

The DI shall determine the amounts of SMEC that it so certifies as follows: With respect to that portion of 1972 SMEC arising from the export of goods to AFNs for resale or lease in substantially unchanged form by the AFNs to unaffiliated customers, the DI shall certify that amount (which may be all of such SMEC) that would be outstanding if the DI's terms to its AFNs did not exceed the terms extended by such AFNs to their unaffiliated customers. With respect to that portion of 1972 SMEC arising from the export to AFNs of goods that are not for resale or lease in substantially unchanged form (for example, capital equipment, raw material or supplies for use or further processing by the AFN), the DI shall certify that amount (which may be all of such SMEC) that would be outstanding in the absence of DI-AFN relationships.

The DI shall retain for possible audit by the Office the books, summaries and other records upon which the certifications are based. Such materials should contain the following information. In support of the certification for export goods resold or leased by AFNs in substantially unchanged form to unaffiliated customers, the materials should contain the export credit terms for such goods extended by the DI to its AFNs and extended by such AFNs on resales or leases. In support of the certification for other export goods, the materials should contain both the export credit terms for such goods extended by the DI to its AFNs and by the DI to unaffiliated foreign customers to whom its exports similar goods directly. As an alternative or in addition to such terms to such unaffiliated foreign customers, the materials may contain other information supporting the DI's certification, such as details of competitors' or industry credit terms and practices.

> In its application for specific authorization, the DI shall include an exhibit setting forth, by scheduled area, projections for 1972 and actual data for 1970 and 1971 showing SME during each such year and SMEC as of December 31 of each such year. The exhibit shall also contain a projection by scheduled area of that amount of SMEC which would be outstanding as of December 31, 1972 if the credit terms to AFNs had not exceeded those that would have been extended in the ordinary course of business pursuant to arm's-length terms. This projection should be calculated pursuant to the same analysis that is required above for determining the amounts of SMEC certified with the DI's annual report. The Office may request such further information as it may deem necessary to support the application.

A specific authorization that grants credit relief on a worldwide basis may also contain an "upstream transfer" provision. This provision authorizes the DI to "upstream" a negative transfer of capital that results from a decrease in specified merchandise export credit in a downstream schedule. (For example, Company X has a $2 million specified merchandise export credit increase in Schedule C and $1 million decrease in Schedule A. If the Office grants worldwide export credit relief of $1 million, the specific authorization may also authorize "upstreaming" of the Schedule A $1 million negative transfer of capital to Schedule C for a specifically authorized total relief of $2 million in Schedule C.)

Each specific authorization will include a "recapture" clause that takes effect if the DI's specified merchandise exports decline in a future year. Pursuant to this clause, to the extent SME in a future year falls below the 1972 level, the DI will be deemed to have made a transfer of capital in such future year in an amount up to the amount of specific authorization relief utilized in 1972.

(C) Reinvested Earnings

Despite the flexibility afforded to DIs to offset reinvested earnings of AFNs by negative net transfers of capital or allocation of available proceeds, hardship may result when DIs are prevented from receiving dividends from AFNs. Foreign laws, contractual restrictions or lack of effective control by DIs over the dividend policies of AFNs may result in hardship owing to a significantly increased U.S. tax burden on the DI. In such cases, DIs may apply for relief to reinvest "restricted" earnings resulting in positive direct investment.

Reinvested earnings relief consists of the three general categories discussed below. Specific authorization generally will be granted to "upstream" schedular allowables in "lower" scheduled areas (except the supplemental $4 million allowable for Schedule A under §507(a)(2)) to cover restricted earnings in the "higher" scheduled areas resulting in positive direct investment in excess of allowables in those scheduled areas.

Pertinent information previously furnished in 1968, 1969, 1970, or 1971, requests may provide the basis for relief in 1972, but the application should substantiate the continued applicability of such information to the 1972 situation of the AFN.

1. The Office is prepared to issue specific authorizations to make positive direct investment by reinvesting earnings in identified incorporated AFNs because of demonstrated legal requirements or lack of effective control over the dividend policies of those AFNs. Such relief will normally be limited to the amount by which the positive direct investment resulting from "restricted" earnings exceeds the DI's Subpart E allowables.

   An application to reinvest restricted earnings based on these grounds must include for <u>each</u> AFN for which relief is requested:

   (a) A forecast of 1972 earnings, dividends, and reinvested earnings.

   (b) Reasons for the DI's inability to cause the payment of dividends by these AFNs, supported by the DI's certification of restrictions due to foreign laws, to contracts, or to lack of effective control by the DI over the dividend policy for each AFN for which relief is requested. (For relief based on lack of effective control, the DI should support his certification with information as to ownership of the AFN (including the percentage of DI ownership), the number of directors representing the DI and other owners on the board of directors or comparable organization controlling dividend payments of the AFN, and the reasons why the DI lacks effective control over the dividend policies of the AFN.)

The DI's future allowables will be charged, as a condition for issuing this relief.

2. If the earnings of a particular AFN are exempt from foreign taxes or subject to foreign taxes significantly lower than those in the United States, so that dividend payments from that AFN would result in a substantial additional U.S. tax burden on the DI (after taking into account use of U.S. foreign tax credits), the Office may issue a specific authorization under which a DI would be permitted to reinvest the earnings of the particular AFN, provided that the AFN purchases a certificate of deposit, or makes a time deposit with a maturity of over one year. (Such certificate of deposit or such time deposit must be made in banks incorporated under the laws of the United States or any State thereof, or the District of Columbia, or the Commonwealth of Puerto Rico, and such banks must be subject to the Federal Reserve Board Foreign Credit Restraint Program. Certificates of deposit may not be purchased from or time deposits may not be placed in any bank branch office that is located outside of the United States or the Commonwealth of Puerto Rico.) Requests to permit the AFN to invest instead in one of the categories of investment listed in section (E) 3.(a)(i), below, may be submitted for consideration by the Office.

   Applications for this relief should include a precise valuation of the tax problem that would be caused by dividend payments on the part of the particular AFN, as well as demonstration of the need for allowables to cover 1972 restricted earnings of any AFNs.

3. The concurrence of the 60-day dividend election under §306 of the Regulations with the rule established by §902(c) of the Internal Revenue Code of 1954 (attributing dividends to particular tax years) may in certain instances create a tax hardship for the DI. If the DI, having previously made the 60-day dividend election under §306, can demonstrate that a significant tax saving would result from deferral of dividend payments, the Office may grant additional days for declaration of such dividends.

Applications for this relief should contain detailed information for each AFN whose deferral of dividend payments would result in tax savings, including a computation of all foreign and U.S. taxes connected with the dividend payment (a) if made within the first 60 days of 1973, and (b) if made a few days later. The DI should also show why the particular AFN and not any other AFN must pay the dividends to achieve 1972 compliance in the corresponding scheduled area. For purposes of these applications, only the allowables in the scheduled area in question need be examined.

(D) Foreign Equity Financing

The Office may specifically authorize the deferral of charges to Subpart E allowables in whole or in part beyond the current year in response to an application involving one of the types of foreign equity financing transactions described below. In determining the appropriate amount of relief, the Office will examine particularly the extent to which the transaction represents foreign investment in the United States that would not otherwise have occurred, and the extent to which the DI's securities will remain abroad and not reflow to the United States.

The application should describe in detail the proposed equity financing and emphasize those features of the proposal that will encourage new foreign investment in the United States and that will induce the foreign investors to retain the DI's securities. The application should also include true copies of any pertinent agreements, including those with underwriters and with foreign investors, and the latest draft of the offering circular of prospectus, if any. DIs must also demonstrate the ability to meet applicable reporting requirements.

The amount specifically authorized and the corresponding charges will generally be based on the market value of the DI's equity securities on the date they are transferred to the foreign national. If, however, the securities are not publicly traded, or are traded only in an extremely limited market, the DI should propose an appropriate method of valuing them.

1. Equity offering designed for foreign security markets.

When appropriate the Office will specifically authorize the DI to treat, as the equivalent of the proceeds of long-term foreign borrowing, the proceeds of the sale in foreign security markets of equity securities qualifying under either of the paragraphs below.

(a) Issuance of convertible preferred shares of a domestically incorporated international finance subsidiary (as described in §323). The DI must provide an acceptable opinion of U.S. counsel or a copy of an Internal Revenue Service ruling that the preferred shares would, if purchased by nationals or residents of the United States, be subject to Interest Equalization Tax. Charges to allowables will be deferred to the year following any conversion. Provided the terms and features of the preferred stock have been designed to foster retention by foreign holders, the Office may authorize treatment of conversions in a manner similar to that provided by §1003. The Office will also consider applications for relief pertaining to the issuance of any other equity securities attracting Interest Equalization Tax.

(b) Sale of equity shares of the DI in an offering designed for and marketed exclusively in the security markets of a designated foreign country or countries. The DI must present detailed information regarding the degree to which the purchases of the securities will constitute investment in the United States that would not otherwise have occurred, and the features assuring that the securities will be retained for investment by foreign nationals. The DI must also demonstrate its ability to monitor and report any resale or transfer of the securities outside the designated country or countries. Generally a charge to allowables of 30% of the amount of proceeds from the sale of the securities will be made in the year that the securities are issued and 10% in each of the next 5 years excusing 20% entirely. If the aggregate resale or transfer of the DI's securities outside the designated country or countries during the first 12 months exceeds 30% of the amount of the proceeds from the DI's original sale, the excess will be charged to the DI at the end of the 12 month period, with the annual 10% charges continuing until a maximum of 80% of the proceeds has been charged.

2. Exchange by a DI of its equity securities in a direct investment transaction with a small group of foreign nationals.

In a transaction in which a DI exchanges its stock for the stock or assets of a foreign entity, the Office is prepared to issue a specific authorization deferring charges to allowables until the year in which the original foreign recipients of the DI's equity securities dispose of them in any fashion. Accordingly, the DI will be charged with a deemed transfer of capital in the year its equity securities are transferred by the original recipients, in an amount equal to the number of securities transferred times the unit value established in the specific authorization.

To qualify for this relief, the DI must demonstrate to the satisfaction of the Office its ability to monitor and report at year-end the holding or disposition of its equity securities by the foreign recipients. Such year-end reports may be based on certification to the DI by the foreign recipients, or on a lockup or similar contractual agreement assuring retention of the DI's shares by the foreign recipients, or on some other means of monitoring acceptable to the Office.

The Office generally will grant this relief only where the foreign recipients of the DI's securities are few in number, are identified, and are not institutions -- such as banks, mutual funds or industrial corporations -- with significant portfolio investment. Where a foreign recipient is a corporation wholly owned by a small number of foreign individuals, the Office may grant relief with provision for charges to allowables as the foreign individuals dispose of their interest in the corporation.

In prior years, a DI may have received a specific authorization requiring a lockup of its shares and imposing a transfer of capital charge during the current year on the expiration of the lockup. Such a DI, by satisfying the mandatory monitoring and

reporting requirements stated above may request a deferral of the transfer of capital charges to the year in which the original foreign recipients dispose of its equity shares.

3. Other exchanges by a DI of its equity securities in a transaction with foreign nationals.

In a transaction in which a DI exchanges its stock for the stock or assets of a foreign entity, the Office is prepared to issue a specific authorization apportioning 30% of the charge to allowables in the year of exchange and 10 percent in each of the next 5 years, excusing 20 percent of the charge entirely.

The Office generally will include in this category of relief only those amounts of the DI's securities which are covered by an investment letter or similar agreement submitted in response to subparagraph (a), below, and for which the DI can make the certification required in subparagraph (b), below.

Applications for this category of relief must include:

(a) An investment letter acceptable for purposes of the SEC private placement exemption or a similar agreement entered into by the foreign recipients of the DI's equity securities stating positively their intention to hold for investment during the foreseeable future the equity securities for which relief is requested.

(b) A certification by the DI that it has made specific inquiries of the foreign recipients as to their present and future plans for resale or transfer of the DI's securities, and that the DI believes that all such plans or intentions are fully revealed in the application.

(c) A description of all features of the transaction that will induce the foreign recipients to retain the securities for investment or that will limit or hinder their resale in any way.

(d) The DI's reasons for requesting this form of relief in cases where the proposed transaction appears to qualify for relief under one of the two categories described in Sections 1 and 2 above.

(e) A statement as to the amount of securities still retained by the foreign recipients at the time of preparing the application if the transaction was completed prior to filing the application.

In cases involving a distribution of the DI's equity securities to a large number of foreign nationals, the Office may make special provision for satisfying the requirement of subparagraph (a) and (b), above.

If the DI's equity securities are to be issued in a fixed, pre-determined amount at specified future dates, the amount specifically authorized will generally be based on the total number of shares to be issued in both the current and future years. If "kicker" or bonus stock is to be issued on the basis of subsequent contingent conditions being met, the DI will estimate the quantity of kicker stock likely to be issued, and the specifically authorized amount may be grossed up accordingly. Kicker stock issued in excess of the gross up will be charged in the year of issue in an amount equal to the value of the stock at that time.

(E) Triangular and Parallel Financing

The Office generally will consider as "triangular" a financing arrangement in which a loan by a DI to an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by the unaffiliated foreign national to an AFN of the DI. The Office generally will consider as "parallel" a financing arrangement in which a loan by a DI to a U.S. subsidiary of an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by the unaffiliated foreign national to an AFN of the DI.

Both types of financing arrangements constitute transfers of capital by the DI to an AFN, under §312(a), at the time of and in the principal amount of the loan to AFN. To the extent that a DI absorbs these transfers of capital within generally authorized direct investment allowables, the DI will not need specific authorization relief. Where

a DI desires relief, however, on application it will be made available in the full amount of the transfer of capital, if the DI provides acceptable assurances, as described below, that the arrangement will not contravene the objectives of the Regulations.

Applications for specific authorization relief pertaining to triangular and parallel financing arrangements may be abridged. In particular, a DI need not submit the information required by Part I(4) and (9) above. The DI's submission should, however, include the following:

1. Identification of the unaffiliated foreign national, the unaffiliated foreign national's U.S. subsidiary, if any, and the AFN involved in the financing arrangement.

2. Description of each loan involved, including principal amount, schedule of repayments, interest rate, currency loaned, guarantee provisions, offset provisions, etc. Certified copies (or copies of the latest drafts) of the relevant legal documents and any governmental approvals that may have been obtained by the DI or its AFN with respect to the arrangement should be included.

3. Assurances that the financing arrangement will not contravene the objectives of the Regulations.

   (a) To satisfy this requirement with respect to a triangular financing arrangement, a DI will be required:

      (i) To obtain from the unaffiliated foreign national, and submit to the Office, a written undertaking from the unaffiliated foreign national, in the form of a covenant in a loan agreement, or a written agreement or certificate in some other form acceptable to the Office, that the unaffiliated foreign national will invest within the United States (as defined in §318) the outstanding proceeds of its loan from the DI (i.e., the unpaid principal of the loan that is outstanding from time-to-time) and any reinvestment thereof, in any one or more of the following categories of investment:

         (A) Equity securities issued by a corporation organized under the laws of the United States, other than equity securities that would, if

purchased by nationals or residents of the United States, be subject to Interest Equalization Tax.

(B) Debt obligations of any political subdivision, agency or instrumentality of the United States, other than direct debt obligations of the United States Treasury.

(C) Debt obligations (including, without limitation, negotiable and non-negotiable instruments, commercial paper, time deposits, and certificates of deposit) having a remaining maturity of more than 12 months, issued by a domestic bank (as defined in §317), or a non-bank financial institution or corporation organized under the laws of the United States, other than debt obligations that would, if purchased by nationals or residents of the United States, be subject to Interest Equalization Tax, and other than debt obligations of a branch office of any such non-bank financial institution or corporation which is a branch office located outside the United States; and

(D) Real property located within the United States (as a result of which investment the unaffiliated foreign national acquires legal title to such real property); and

(ii) To assure the Office, by submission of a written certificate by the DI or by some other manner acceptable to this Office, that, based upon all information communicated to the DI by the unaffiliated foreign national and upon other information in the DI's possession, it is the DI's reasonable understanding and belief that it is not the intention of the unaffiliated foreign national to use the proceeds of its loan from the DI in any manner either:

(A) To replace or substitute for funds that the unaffiliated foreign national otherwise intended to provide or obtain from sources outside the United States, or

(B) To facilitate transfers of funds from the United States that would not have occurred in the absence of such loan.

As a condition to specific authorization relief involving triangular financing arrangements, the DI will be required to report, on or together with its Annual Report, Form FDI-102/102F, for the year in which the loan to the unaffiliated foreign national is made, and thereafter for each year so long as such loan has not been repaid, whether the categories of investments required pursuant to the condition set forth in paragraph 3 (a)(i) above have been properly maintained by the unaffiliated foreign national. If the unaffiliated foreign national does not properly maintain such investments, the DI will be charged with a transfer of capital to its relevant AFN.

(b) To satisfy this requirement with respect to a parallel financing arrangement, a DI will be required to assure the Office, by submission of a written certificate by the DI or by some other manner acceptable to the Office, that, based upon information communicated to the DI by the unaffiliated foreign national and/or the latter's U.S. subsidiary receiving the loan from the DI, and upon all other information in the DI's possession, it is the DI's reasonable understanding and belief that it is the intention of the unaffiliated foreign national to cause its U.S. subsidiary, and it is the intention of the U.S. subsidiary:

(i) To invest and retain within the United States (as defined in §318) the outstanding proceeds of its loan from the DI, and any reinvestment thereof, and not to hold any of such proceeds in any of the following forms:

(A) Money on deposit in a foreign bank (as defined in §317), including, without limitation, demand and time deposits, and certificates of deposit of a foreign bank;

(B) Debt obligations (including, without limitation, negotiable and non-negotiable instruments, and commercial paper), equity securities, and any other type of investment contract of a foreign national (as defined in §302); or

(C) Any other foreign property; and

(ii) Not to use the proceeds of such loan in any manner either:

(A) To replace or substitute for funds that either the unaffiliated foreign national or its U.S. subsidiary otherwise intended to provide or obtain from sources outside the United States; or

(B) To facilitate transfers of funds from the United States that would not have occurred in the absence of such loan.

In satisfying the conditions set forth in paragraph 3 (a)(ii) and 3(b) above, the DI may rely on representations made to it by the unaffiliated foreign national and the latter's U.S. subsidiary, unless the DI believes such representations to be inaccurate.

(F) Liquid Foreign Balances

The Office normally will grant a specific authorization to increase the amount of the liquid foreign balances that a DI is allowed to hold under §203(c), provided it can be shown that:

1. The additional balances are required because of a significant change in business activities since the 1965/1966 base period, and

2. It is unduly burdensome to operate within the present limit.

Both the above conditions must be fulfilled if relief is to be granted. To demonstrate a significant change in business activities since the base period, the DI must evidence new or significantly expanded foreign business activities that require foreign balances to be held for the account of the DI. To support a request for relief, the DI must describe the purpose of the foreign bank account(s) in which operating balances will be held, provide information as to the source of credits to such accounts, and explain why it is impossible to maintain these balances below the limitation imposed by 203(c).

The Office may also give relief to DIs maintaining foreign bank accounts solely to receive payments from foreigners, if the timing of these payments at or near month-end cannot be controlled by the DI, if the bank has standing instructions promptly to remit payments to the U.S., and if local banking practices impede immediate clearing and remittance to the extent needed to comply with the §203(c) limitation. Evidence must also be presented that such bank accounts are expected to bear little or no interest and the deposits do not serve as collateral for other financial transactions. This relief will be considered in connection with other uses the DI is making of the amount generally permitted by §203(c).

Relief may be granted by either a permanent or a limited time increase in the level of liquid foreign balances permitted. To qualify for a permanent increase, the DI must demonstrate to the satisfaction of the Office that the conditions giving rise to the need for these balances will continue in effect for the foreseeable future. Otherwise, the relief will be granted for the period during which the need can be evidenced.

(G) Upstreaming the §504(b) Earnings Allowable

The Office may authorize a DI which elects the §504(b) earnings allowable to "upstream" all or part of the Schedule A earnings allowable to Schedule B or C, and the Schedule B earnings allowable to Schedule C, provided that the DI demonstrates:

1. A requirement for use of the additional allowables in upstream schedules; and

2. The upstreamed allowables are not required in downstream schedules.

Those DIs with losses in a particular schedule in 1971 will be authorized to upstream only a fraction of the downstream allowables. The fraction will be the ratio of the annual earnings in 1971 in all schedules (excluding Canada) to the sum of 1971 annual earnings of schedules in which such earnings are positive.

(H) Capitalized Exploration Expenditures

The Office is prepared to grant specific authorization to make positive direct investment in 1972 in excess of that generally authorized, if such excess is attributable to capitalized exploration expenditures.

Exploration expenditures are defined, in general, as the DI's share of costs, incurred by or for the benefit of AFNs, of acquiring exploration rights and of ascertaining the existence, quantity, quality or location of a mineral resource prior to the determination that a commercially marketable discovery has been made with respect to a reservoir or body of mineral resources. DIs requesting this relief should state in their application the precise definition of exploration expenditures used in their financial accounting. This definition should be consistently followed in submitting data and applying relief.

The relief (R) will be determined by schedule and will in no event exceed an amount equal to: (1) 70% of total capitalized and expensed exploration expenditures (TE) in 1972, less (2) the sum of (a) exploration expensed (EE) in 1972 and (b) amortization and write-offs in 1972 of previously capitalized exploration (A). In formula terms, $R=0.7TE-(EE+A)$. In some cases, the specific authorization may be further limited by other considerations.

The relief will not involve any change in accounting and reporting practices. As a condition for granting relief, the DI will be deemed to have made a transfer of capital in each of the five subsequent years equal to 20% of the amount of specific authorization utilized in 1972.

In addition to the general information required in Part I (A), above, the following information should be submitted for each scheduled area for 1968, 1969, 1970, 1971 and 1972 (estimate):

1. Total exploration expenditures by all AFNs made in each year with a breakdown between capitalized and expensed expenditures.

2. The amount in each year of amortization and write-offs of exploration expenditures previously capitalized for all AFNs.

3. The amount of aggregate unamortized capitalized exploration expenditures of all AFNs, as of December 31 of each year.

Furthermore, a list of AFNs making exploration expenditures should be submitted. If detailed information on exploration expenditures is not available for non-controlled AFNs (50% or less interest by the DI), such AFNs should be identified and an explanation provided as to the reason why the information is unavailable.

(I) Change in Elections

Direct investors making application for specific authorizations relating to changes in election should generally submit their application as early as possible.

1. 60-Day Dividend Adjustment.

   If a DI did not make the election on its FDI-101 originally filed in 1968 to treat dividends paid within 60 days after the end of the year as having been made during such year, it may request a specific authorization to make such election on a prospective basis, without retroactive compliance effect.

   Accompanying this request should be data, by scheduled area, giving dividends paid by AFNs in the first 60 days of each year beginning with 1965 through the year of application. If the Office grants the change in election, it may require adjustments to the DI's current allowables to maintain comparability with the effect of such an election effective at the beginning of the Program in 1968.

2. Change in allowable election from §503 in 1971 to 507 in 1972 or from §507 in 1971 to §503 in 1972.

   Pursuant to §502(c) and (d), DIs which in 1971 elected to be governed by §503 or §507 may not in 1972, without prior permission of the Secretary, elect to be governed by §507 or §503, respectively. A DI requesting a change should, besides explaining in general terms the reasons for wanting to change, submit the following:

   (a) If the change is from §503 to §507:

      (1) a pro forma Form FDI-102F for 1971 showing all entries as if the DI has elected the §507 allowable;

(2) a description of each §505 interschedular transfer in 1971 involving Schedule A; and

(3) a detailed description of the anticipated use for 1972 of the §507 allowable.

(b) If the change is from §507 to §503:

(1) a detailed description of the use in 1971 of the §507 allowable describing each capital transfer involving Schedule A;

(2) a pro forma projected Form FDI-102F for 1972 showing all entries as if the DI would elect the §507 allowable; and

(3) a description of each anticipated §505 interschedular transfer in 1972 involving Schedule A.

(J) Expropriation of AFN Property

Any DI that has had AFN property expropriated by a foreign government at any time during which the Program has been in effect may apply for specific authorization to make positive direct investment. Although the Office will consider each case on its own merits, the maximum authorization will be the amount necessary to supplement any present and future recognition under the Regulations of the compensation and loss arising from the expropriation, in order to permit the DI to restore its level of investment in the Scheduled Area in which the expropriated property was located. Any DI computing its allowables on the basis of earnings may apply for specific authorization to exclude from such computation AFN losses resulting from expropriation.

III. APPLICATION FOR AN INTERPRETATIVE OPINION

An application for a legal interpretation or accounting opinion must be submitted in quadruplicate (accompanied by appropriate proof of authority) to the Chief Counsel, or the Assistant Director for Audits and Accounting, Compliance Division, respectively, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington, D.C. 20230. Any printed or written information previously supplied to the Office by the DI may be incorporated in the application by reference.

An application should relate to a particular method of business, or to a particular transaction that the DI actually proposes to consummate with named parties or that the DI has previously consummated, or to an accounting practice that the DI is using or proposes to use. Applications posing general questions or concerning hypothetical situations will not be considered by the Office.

While there is no prescribed form for applications for interpretative opinions, they should contain the information required in Part I (4) and (5) above, and also the following information:

1. All material elements of the transaction, including the identities of all AFNs and other parties having a material financial interest in the transaction, and the nature and value of the consideration involved, and if the transaction involves a written agreement, a true copy of such agreement should be attached to the application.

2. If the application concerns an accounting practice, a brief description of the practice, including an authoritative citation showing that the practice is in accordance with accounting principles generally accepted in the United States, and whether it is applied on a basis consistent with the DI's prior year financial statements to its shareholders and reports submitted to the Office.

3. The interpretation requested and the reasons in support of such interpretation, referring, where applicable, to the relevant sections of the Regulations or General Bulletin.

IV. APPLICATION FOR AN INTERPRETATIVE OPINION AND (OR IN THE ALTERNATIVE) A SPECIFIC AUTHORIZATION OR EXEMPTION

An application for a specific authorization (or exemption) and an application for a legal or accounting interpretation, may be combined in a single submission. Such a combined application may, for example, request a particular interpretation, or, in the alternative, should the requested interpretation be denied, a specific authorization (or exemption).

A combined application for a specific authorization (or exemption) and an interpretation should contain the information required in Parts I and II, as applicable, and Part III of these instructions, and should be submitted in quadruplicate to the Chief Counsel, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington, D.C. 20230.

A combined application requesting a legal or accounting interpretation, or, in the alternative, a specific authorization (or exemption) should contain the information outlined in the preceding paragraph and should be submitted in quadruplicate to the Chief Counsel, or the Assistant Director for Audits and Accounting, Compliance Division, respectively, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington D.C. 20230.